THE TEMPLE PRIMERS

INTERNATIONAL LAW

By

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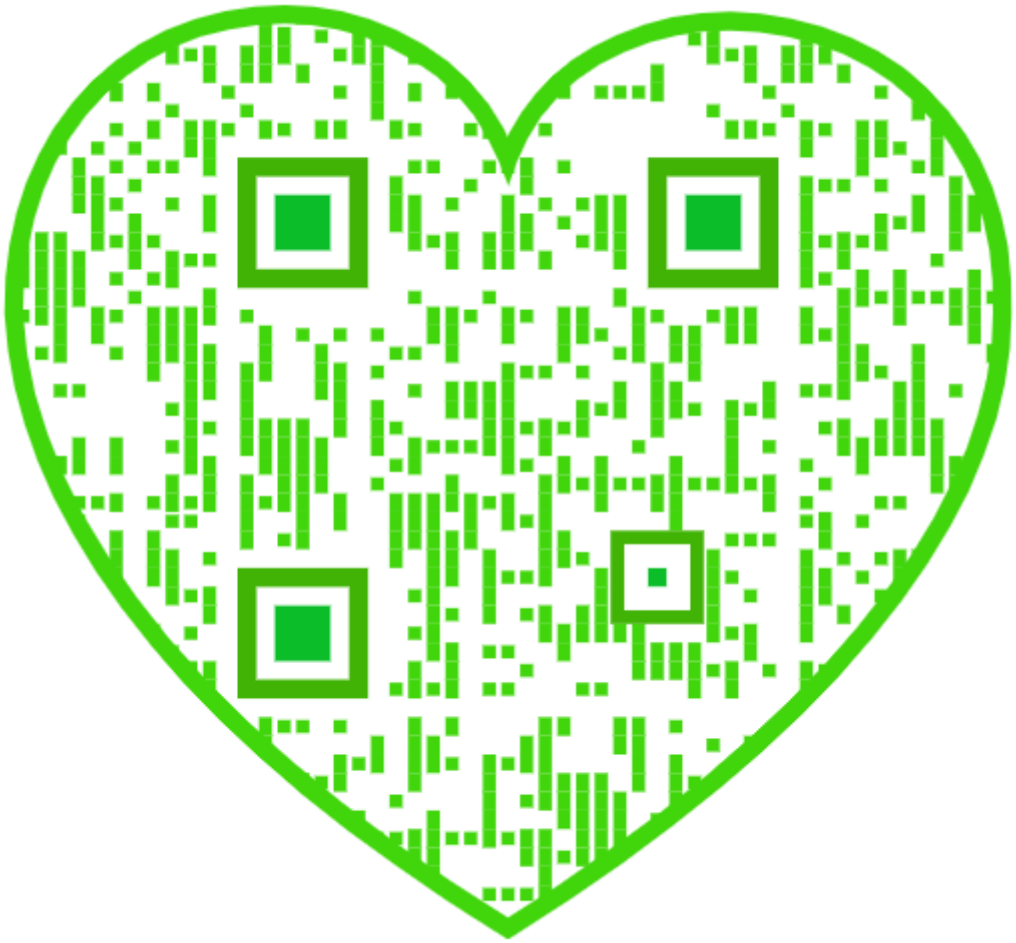

LORD STOWELL

INTERNATIONAL LAW

BY F·E SMITH·B·C·L

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TO THE

HON. GEORGE BRODRICK

WARDEN OF MERTON COLLEGE, OXFORD

IN RECOLLECTION OF MANY GREAT KINDNESSES

THIS LITTLE BOOK IS GRATEFULLY

DEDICATED

PREFACE

In writing this little book, I have continually referred to the works of Phillimore, Wheaton, Kent, Manning, Lorimer, and Halleck, but my obligations have been greatest to the late Mr. W. E. Hall, and the late Mr. Dana, both of whom brought to the study of International Law extensive learning and remarkable common sense. Among living writers I must mention with grateful appreciation Professor Westlake of Cambridge, and Professor Holland, whose lectures I had the opportunity of attending at Oxford. Both these gentlemen have done much by their assiduous attention to the great questions of the day to keep alive the tradition that Professors of International Law shall also be men of affairs. I have read with profit the brightly written book of Mr. T. G. Lawrence, the very learned researches of Mr. T. A. Walker, and the judicious articles by Mr. Barclay in the *Encyclopedia of English Law*. My thanks are particularly due to my friends, Mr. E. G. Hemmerde and Mr. Leslie Scott, both of the Inner Temple, for reading through the proof-sheets, and for some useful suggestions.

It will be noticed that I have given numerous extracts from the judgments of Lord Stowell in that portion of the work which deals with neutrality. It did not appear to me that the attempt to paraphrase them would add either to the authority or attractiveness of my book.

In attempting to treat the vast subject of International Law within the compass of less than two hundred pages, I cannot hope to have avoided inaccuracies, omissions, and, above all, a dogmatism of style which is not unlikely to irritate. On the other hand, I have made an honest attempt to see and state the Practice of Nations as it is, and I am not altogether without hope that this manual may be of use to students, politicians, and men of business who cannot spare time to read the infinitely more useful treatises to which I am so much indebted.

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INTERNATIONAL LAW

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INTRODUCTORY CHAPTER

1. By International Law is meant the rules acknowledged by the general body of civilised independent states to be binding upon them in their mutual relations. In a form more or less rudimentary we may suppose such rules to have existed almost from the infancy of society, for national isolation or recognition of international rights and duties must always have been necessary alternatives. Small indeed was the area covered by these rough and ready conventions, and when a new rule was added to the code, it sprang from the imperious promptings of mutual convenience or mutual safety. The sanctity conceded by ancient sentiment to the office of herald supplies a well-known instance of this class of rules. The duty of respect to this office is insisted on in the Homeric poems, and when the people of Ammon sent back David's ambassadors[1] without one side of their beards, it was felt that the limits of international outrage had been reached. We must not trace in the immunity of envoys the germs of a nascent humanity: it was an immunity involved in the necessity of international intercourse. Outrages would naturally have been followed by reprisals, until the calling of a herald gradually ceased to attract. The constitution of ancient societies was little favourable to the development of a systematic body of rules. Since states are its units, inter-

[1] 2 Samuel x. 4.

national law can only exist where a number of communities acknowledge a mutual equality before the law and make common submission to its authority. Such a body of rules was faintly conceived of among the Greek City States where national conduct was defended and attacked by a reference to

τὰ τῶν Ἑλλήνων νόμιμα τὰ πρὸς τοὺς Ἕλληνας δίκαια.[1]

No doubt these *νόμιμα* were consolidated by pride in Hellenic nationality and the abhorrence of savage practice,[2] but the Greek mind with all its immense intellectual subtlety was never a legal mind; the area over which the inter-state customs extended was curiously partial and arbitrary, and the sanction on which they uncertainly depended was really the sentiment of *noblesse oblige*.

2. **Italy.**—Turning to the early history of the Italian cities we find in the *jus fetiale* the elements of a system whence international law might have ultimately sprung, if the growth of Imperial Rome had permitted the survival of independent communities. The formulæ preserved by Livy[3] suggest that the Pater Patratus, or spokesman of the diplomatic school, was a functionary found in each considerable Italian community. It is a fair assumption from the materials before us that international disputes were ceremoniously discussed between the fetial colleges of the states involved, with a view to settlement on established principles.

3. **Modern International Law.** — The analogies furnished by ancient society are too precarious for further examination here, and we pass hurriedly on to the birth of modern international law. The opportunity came with the break up of the Roman empire into independent states, but a period of darkness immediately followed little favourable to the evolution of legal principles. Alike

[1] The laws of Hellas: the rights which Hellenes may exact from one another.

[2] Cum barbaris æternum . . . bellum Græcis est.—Livy xxxi. 29.

[3] **Livy,** Book i. 32.

in Eastern and Western Europe men were waging desperate wars, the bloody records of which were to be the authorities of Ayala and Gentilis. These two writers appeared almost together towards the close of the sixteenth century; their views are often confused and sometimes absurd; they are deficient alike in the sense of proportion, and the faculty of discrimination, but their publication none the less marks an immense advance in international morality. Now for the first time it was boldly affirmed that the conduct of states should be controlled by legal rules. The code was a ruthless one, but the alternative was complete lawlessness. Immeasurably greater than these two writers on the constructive and critical side was their successor, Hugo Grotius, who was born in 1583, the year after Ayala's work was published. It would be hard to mention any writer in any field of literature who has more profoundly influenced the course of human history. Grotius was no specialist. Law, theology,[1] politics, scholarship—all at different times engaged his marvellously facile pen; but the publication of his famous work, *De Jure Belli et Pacis*, showed that a clear and original thinker was devoting his great intellect and unrivalled learning to the infant science of international law. It may be imagined that Grotius and his predecessors did not find ready-made the principles on which their science was to rest. No doubt there were precedents, but they were mostly of a kind to be evaded, and a treatise on international law, which derived its rules of war from the belligerent records of the preceding centuries, would have been a qualified blessing to humanity.

4. **Law of Nature.**—The labours of Ayala, of Gentilis, and of Grotius could never have produced results so great had they not been associated with a conception which has, perhaps, caused more loose thinking than any other in the history of thought—that of the law of nature. In its origin this phrase

[1] 'I would recommend to every man whose faith is yet unsettled Grotius, Dr. Pearson, and Dr. Clarke'—Dr. Johnson. See Croker's *Boswell*, vol. i. p. 171.

denoted simply those universally received rules of morality which deal with the external actions of men.[1] In this sense the occasional contrast between natural law and positive law is familiar enough in Greek tragedy and elsewhere. Many things are shocking to morality which it is not convenient to pronounce illegal. Conversely many laws may be broken, for instance such as deal with *mala prohibita* rather than *mala per se*, without any violation of the moral law. None but a sensitive conscience will be shocked because a friend rides his bicycle on the parapet in a lonely place where the road is bad. The modern use of the expression 'law of nature' does not differ greatly from the earliest. Thus Sir Frederick Pollock writes:—'By the ethical school I mean . . . those authors who throw their main strength in investigating the universal moral and social conditions of government and laws, or at any rate civilised government and laws, and expounding what such government and laws are, or ought to be, so far as determined by conformity to these conditions. This is the nearest account I can give in few words of what is implied in modern usage by the terms law of nature, *droit naturel* or *Naturrecht*.'[2] To this account it must perhaps be added that 'law of nature' in modern usage expresses those rules of morality by which the outward acts of man are tested, whether their

[1] See Holland, *Jurisprudence*, ed. 3, pp. 28-35; and Maine, *Ancient Law*, ch. iii. and iv.

See Austin, *Province of Jurisprudence Determined*, Lecture I.

Cf. also the description of natural law given by Grotius with the passage following it from Aristotle:—

Grotius i. 1.—Dictatum rectæ rationis indicans actui alicui ex ejus convenientia aut disconvenientia cum ipsa natura rationali ac sociali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturæ Deo aut vetari aut præcipi.

Arist. *Nic. Eth.* v. 7:—

Τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστι, τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δυνάμιν, καὶ οὐ τῷ δοκεῖν ἢ μή, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται διαφέρει.

[2] *History of Science of Politics*, p. 110.

area be co-extensive with or larger than that of positive law. But it was neither in its earlier nor its modern use that the law of nature exercised an influence so profound over international law. To understand that influence, a brief reference must be made to the law of nature as it figured in the Stoic philosophy. In the Cosmogony of Zeno the law of nature indicated the physical rules which determined the dependence of the universe upon the evolution of πνεῦμα or primitive substance.[1] When Stoicism became a fashionable creed in Rome, the popular mind was most vividly impressed by the simplicity which distinguished its votaries in an age of growing luxury. Soon arose a picture, ideally attractive, of a natural state of society to which the artificiality of a perverse age had been happily unknown. The society was conceived of as controlled by rules of transcendent because spontaneous justice, and to these rules the familiar description 'law of nature' was applied.

Under another name this law of nature was to play an incalculable part in the development of the law of Rome. The exclusive jealousy of the foreigner, which is so characteristic of ancient societies, had closed the door of the *jus civile*, or native Roman law, to alien residents. To adjust disputes when one of the parties was an alien, the Prætor had pieced together a body of rules drawn collatively from the communities which lined the Mediterranean seaboard. To these rules was given, by reference to their source, the name *jus gentium*, or law of nations. In its origin it was despised as an inferior system having no part in the ceremonious observances which distinguished the indigenous code. In fact, it soon became the source from which a wealth of equitable principle was obliquely infused

[1] *Cf.* Verg. *Æn.* vi. 724 :—

Principio cælum ac terras camposque liquentes,
Lucentemque globum Lunæ Titaniaque astra
Spiritus intus alit, totamque infusa per artus
Mens agitat molem, et magno se corpore miscet.

into the Roman system, through the sympathetic medium of the Prætor's edict. It was inevitable that sooner or later Roman common sense should apply the standard of convenience to the two distinct streams of which Roman jurisprudence was to be the splendid confluence; but the process was no doubt hastened by the increasing vogue of Stoic simplicity. It would be too long to recount here the various steps which preceded the recognition that the *jus civile* fell far short of the 'natural' standard which its cosmopolitan rival seldom failed to satisfy.[1] It is sufficient to say that by the time of Justinian the law of nature and the law of nations were commonly identified. We are now in a position to understand the part which these conceptions played in the success of Grotius. He addressed an audience which demanded nothing more than a stable principle, on which to construct the jural relations of states. To readers full of the mediæval respect for authority, the voice of Grotius would have been the voice of one crying in the wilderness, if he had prescribed or forbidden conduct by outspoken reference to the standard of moral right and moral wrong. But the matter assumed a different aspect when rules, which recommended themselves by a novel humanity, were further affiliated on the respectable authority of nature's law. To this result the later Roman identification of the law of nature and the law of nations materially contributed. The subject of Grotius' treatise was commonly and conveniently described as the law of nations: if then the law of nations was the law of nature, it followed that the relations of states must be governed by the laws of nature. Through this loophole men gradually infused into the practice of war the restraining influence of a humaner morality. In another way the confusion between *jus gentium* and the dawning science produced results of far-reaching importance. It led to the wholesale introduction into international law of the highly refined conceptions of

[1] Maine, *Ancient Law*, p. 52, ed. 14. See also Moyle Justinian, ed. 3, Introduction, p. 36.

Roman jurisprudence. As Sir Henry Maine[1] has expressed it, 'Setting aside the conventional or treaty law of nations, it is surprising how large a part of the system is made up of pure Roman law. Whenever there is a doctrine of the jurisprudents affirmed by them to be in harmony with the *jus gentium*, the publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctively Roman origin.'

5. The danger is manifest enough of basing international law on a body of rules so little determinable as the precepts of nature. Between the moral and the immoral there is a shadowy border line—a Debatable Land—which has long been the battlefield of ethical writers. If men are not agreed on the points which natural law allows or disallows, there will be as many standards of law as there are commentators. This confusion has thrown much undeserved discredit upon international law. Many writers in dealing with concrete matters of controversy have appealed to the law of nature in the terms appropriate to an English barrister who hands up to the court a recent decision in the House of Lords. An esteemed French writer[2] applies the 'natural' standard to one triviality after another with complacent regularity, and thus reinforced makes short work of terrestrial precedents. So abused, the law of nature becomes a subtle and disingenuous pretext for dogmatism.

6. **Law of Nature in Modern Times.**—It may be asked, What is the real relation of the so-called law of nature to the international law of to-day? A study of diplomatic correspondence almost suggests the rule, 'When no other argument offers try the "law of nature."' On principle it would seem that the law of nature is to international law exactly what it is to positive law. It cannot be cited to overrule the positive precepts of either, but these precepts will, if possible, be construed consistently with the moral law. The influence of natural law is in-

[1] *Ancient Law*, p. 97, ed. 14. [2] Hautefeuille.

tangible; it is, so to speak, 'in the air,' colouring the views we take of positive law, but never to be cited in its teeth. What then are the principal materials with which international law is concerned? They are to be found in the various precedents from which the general practice of states in their mutual dealings is deducible. It deals with that practice as it is, and not, at least primarily, as it ought to be. Blackstone's *Commentaries* are one thing; Bentham's *Theory of Legislation* another. There have been too many Benthams in the history of international literature, and their failure to distinguish between what is and what ought to be has tended to discredit their real services.[1]

7. **The Analysts and International Law.**—The present chapter seems the most convenient place to consider how far the practice of nations is properly described as legal. Is international law law at all? Lord Salisbury has observed, 'It can be enforced by no tribunal, and therefore to apply to it the phrase "law" is to some extent misleading.'[2] The late Mr. Austin, in his *Province of Jurisprudence Determined*, laid it down that international law rests merely on the support of public opinion, and cannot therefore be properly called law. The English Analytical School, of which Austin was the first and the greatest, is irretrievably committed to this doctrine. Putting on one side Austin's questionable inclusion in his scheme of the law of God, we find that he conceives of positive law as a command addressed to a political inferior by a political sovereign superior, acting as such, and followed by a sanction in the event of disobedience. This conception clearly excludes international law. It is proposed to consider how far the exclusion is academic, and how far it is supported by essential differences. The answer to these questions depends on the legitimate scope

[1] *Cf.* Lord Salisbury's remark reported in the *Times* of July 26, 1897 :—'International law . . . depends generally on the prejudices of the writers of text-books.'

[2] *loc. cit.*

of the term 'law.' If the significance of this term be examined, two main characteristics strike the attention: (i) the uniformity of law; (ii) the compulsoriness of law. The use of the word has, so to speak, bifurcated, according as the attention has lingered on one or the other aspect. It is used on the one hand to denote the unvarying sequence of natural phenomena, and on the other the positive laws peremptorily imposed by a sovereign upon his subjects. By the expressions 'law of refraction' and 'law of gravitation' nothing is conveyed, as Professor Holland has well expressed it, but that rays are refracted and objects do gravitate. These latter uses are metaphorical and therefore unobjectionable. With international law the case stands otherwise. Either it does possess the essential characteristics of law, or it does not; if it does not, the very closeness of its resemblance thereto, the very legal complexion of its rules, makes it imperative to notice the chasm between them. It is by no means clear that the objections of Austin can be dismissed as pedantic. They are objections of an essentially practical kind. Take away from the meaning of 'law' its sanction—the evil in which society involves the lawbreaker—and you leave little that is characteristic of the word. What is the sanction of international law? It is self-help in its most licentious form: for international law professes itself unable to regulate the occasions on which resort may be made to war, the litigation of states. The result is strangely paradoxical. As between Nation A and Nation B international law declares A bound to do a certain act. A refuses: it has broken the law. War follows in which A is victorious. So far as international law is concerned the nation is now justified in its refusal. Such a practice is almost anarchical, and no analogies, however striking or numerous, between international law and law proper can blind us to the impassable gulf which divides them. Nor has the absence of a superior able to enforce obedience to law failed to exercise a weakening influence

9. Sir F. Pollock has made the following observations on the nature of international rules: 'We are not called upon to consider here whether they are more nearly analogous to the law administered by courts of justice within a state, or to purely moral rules, or to these customs and observances in an imperfectly organised society, which have not fully acquired the character of law, but are on the way to become law.'[1] The analogy last suggested is no doubt a fairly exact one, but it must always be remembered that, to all appearances, international law has attained to a perfect development of type: it is therefore an inchoate law never destined to reach maturity.

10. **The Hague Conference.**—It could only become perfect law if the general body of states comprised a tribunal sitting to decide disputes by reference to established principles, and able to enforce their awards on recalcitrant members of the national family. It would then become law without ceasing to be international. The recent proposals of the Czar of Russia, and the conference at the Hague to which they led, have naturally directed attention to the possibility of an age of peace. Serious thinkers, not daring to hope that the future will differ materially from the past while human character and human motives remain unchanged, gave little encouragement to the more ambitious of the Russian proposals. The charge of cynicism sits lightly upon those who sorrowfully believe in the inevitableness of war, for such a view is consistent with a very sincere detestation of its horrors. There is a tendency observable to-day, particularly among those whose occupations happen to be pacific, to exaggerate the other side of the picture.[2] Their views receive little

[1] *Jurisprudence*, p. 13.

[2] Thus Mr. Woolsey, a very humane writer, cheerfully observes (*Intr. to International Law*, ed. 5, p. 184):—'To states, by the divine constitution of society, belong the obligations of protecting themselves and their people, as well as the right of redress, and even perhaps that of punishment. To resist injury, to obtain justice, to give wholesome

encouragement from men who have seen war face to face. It is a curious commentary on the psychological materials to which our modern peacemakers are driven, that their strongest argument is drawn from the growing destructiveness of modern weapons. I do not think that accurate observers will dispute the gloomy conclusion that the prospects of universal peace have seldom been less encouraging.

11. **International Law and Municipal Law.**—The question has been often discussed and differently answered, how far civilised states consider the admitted rules of international law to be binding upon their own tribunals in cases not covered by the municipal law. So far as this country is concerned the statute 7 Anne, c. 12 is expressed to 'declare' not to 'enact,' the privileges of ambassadors, and the preamble recites an insult 'contrary to the law of nations.' The judgment of Lord Mansfield in Triquet *v.* Bath[1] contains an interesting observation on this point:—

'I remember a case before Lord Talbot of Buvot *v.* Barbert in which Lord Talbot declared a clear opinion that the law of nations in its full extent was part of the law of England, and that the law of nations was to be collected from the practice of different nations and the authority of writers. And accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, etc., there being no English writers of eminence on the subject. I was counsel in the case and have a full note of it. I remember, too, Lord Hardwicke's declaring his opinion to the same effect.'

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lessons to wrongdoers for the future, are prerogatives deputed by the Divine King of the world to organised society, which, when exercised aright, cultivate the moral character and raise the tone of judging throughout mankind.' The passage is well known from Mr. Gladstone's Midlothian speech:—'However deplorable wars may be, they are among the necessities of our condition: and there are times when justice, when faith, when the welfare of mankind require a man not to shrink from the responsibility of undertaking them. And if you undertake war, so also you are often obliged to undertake measures which may tend to war.'

[1] 3 Burr. 1478.

Even more emphatic were the propositions accepted in principle by the American Federal Government:[1]—

'The law of nations is part of the municipal law of separate states. The intercourse of the United States with foreign nations, and the policy in regard to them being placed by the Constitution in the hands of the Federal Government, its decisions upon these subjects are by universally acknowledged principles of international law obligatory on everybody. The law of nations, unlike foreign municipal law, does not have to be proved as a fact. The law of nations makes an integral part of the laws of the land.'

These concessions are very remarkable, though they are hardly perhaps borne out by well-known decisions of the American prize courts. If the view put forward be well-founded, an English judge, if satisfied of the existence of an international rule, is bound to apply it in a proper case whether the English law provides him with a warrant or not. The generous verbal tributes to international law, which are so familiar, are not reinforced by practice on this point, and the opposite conclusion forcibly stated by Cockburn, C. J., in R. *v.* Keyn[2] is difficult to answer.

'And when in support of this position . . . the statements of the writers on international law are relied on, the question may well be asked, Upon what authority are these statements founded? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given. For even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilised nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law.

[1] Maine Lectures, *International Law*, p. 36.
[2] L. R. 2 Ex. D. pp. 202, 203.

To be binding the law must have received the assent of the nation who are to be bound by it. . . . Nor in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply without an Act of Parliament what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law: but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on.'

To the same effect Lush, J.,[1] observed:—

'International law . . . cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament.'

Perhaps another proposition, also accepted by the American Government, may be admitted to modify the sweeping affirmations of that referred to above:[2]—

'The law of the United States ought not, if it be avoidable, so to be construed as to infringe on the common principles and usages of nations and the general doctrines of international law. Even as to municipal matters the law should be so construed as to conform to the law of nations unless the contrary be expressly prescribed. An act of the Federal Congress ought never to be construed so as to violate the law of nations if any other possible construction remains, nor should it be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country.'[3]

Probably the practice is accurately stated in the two following propositions: (i) International law is not administered by municipal tribunals unless it has been adopted by the state legislature, and such adoption will not be pre-

[1] U. S. at p. 239.

[2] Quoted Maine, *International Law* p. 36.

[3] *Cf.* with this view the judgment of Gray, J., in the *Paquete Habana*, the *Lola* (1899) 175 U.S. 677.

sumed; (ii) Municipal law will where possible be so construed in doubtful cases as not to conflict with the rules of international law.

12. To summarise briefly the views expressed in this chapter as to the real nature of international law, it consists of rules to control relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness, but it is habitually deficient in that coercive side of the term law, which is above all others essential and characteristic. All civilised nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, they are not infrequently broken, and breaches may be consecrated by adding successful violence to the original offence. In reality the sources of its strength are three: (i) a regard—which in a moral community often flickers but seldom entirely dies—for national reputation as affected by international public opinion; (ii) an unwillingness to incur the risk of war for any but a paramount national interest; (iii) the realisation by each nation that the convenience of settled rules is cheaply purchased, in the majority of cases, by the habit of individual compliance.

ARRANGEMENT OF THE SUBJECT

PART I.—1 Nomenclature and Sources.

2. The Subjects of International Law, and the Agents by whom they are represented in Foreign Countries.

PART II.—The Rights and Duties of States in Time of Peace.

PART III.—Belligerency, or the Rights and Duties of States in Time of War.

PART IV.—Neutrality, or the Rights and Duties of Neutral States.

PART I

CHAPTER I

Nomenclature and Sources

1. The name 'International Law' is due to Jeremy Bentham. In a well-known passage he observes:—

'The word "international," it must be acknowledged, is a new one, though it is hoped sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D'Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens* ought rather to be termed *droit entre les gens*.'[1]

International Law is to be carefully distinguished from the body of rules variously known as Conflict of Laws, Private International Law, and Comity of Nations. These rules form part of the private law of every civilised nation, and determine the appropriate *jus* and the appropriate *forum* in disputes between two persons acknowledging different nationalities. They are in no way concerned with the reciprocal legal relations of states.

2. **Sources of International Law.**—It was suggested in the introductory chapter that the rules of international law are not a perfect system, existing some-

[1] Bentham: *The Principles of Morals*, xvii. 25, note.

where in the clouds and intuitively determinable, but are generalisations inductively drawn from the practice of civilised states in their mutual dealings. The adoption of this view effects an immense simplification in the study of international law; when once the *à priori* method is laid aside, the occasions for obscurity become infinitely fewer, and the science at least rests upon a firm historical basis. To decide whether a given practice is legal or illegal, an examination of precedents is necessary, of a kind very familiar to all lawyers. If authority pronounces itself in favour of a particular practice, a writer who disapproves of it must content himself with advocating a change. International law will never acquire the strength sufficient to carry it through a period of strain unless authority is made to exclude individual opinion almost as decisively as it does in our English system. To underrate the influence of the great jurists would be a proof of inattention or ignorance, but aggressive states are little likely to soothe the suggestions of ambition by admonitions drawn from Grotius, Puffendorf, Vattel, or Heffter, unless the practice of rival nations has lent them an additional semblance of authority. If these views are well founded, the sources of international law ought not to be very difficult to discover. It is to history that the writer of international law must turn for his authorities, and it is hardly too much to say that the sole source of law is national practice, but that several media of proof are admissible to establish this practice.[1] Two further qualifications are necessary. Recent practice is more binding than that which it is older, and where nations differ the value of

[1] It is submitted that the above use of the term 'source' of law is the most correct and analogous. The Roman expression was *fons juris* and the metaphor was responsible for a like ambiguity in Latin usage. In both popular and strict language the source of a legal rule is the author of its legal character. Thus in England the only source of law is the Crown and the two chambers acting harmoniously. Political speculation and the science of legislation are the 'sources' whence spring the *ideas* by which the 'source of law' is excited into activity (*cf.*, however, Austin, Lect. 28).

competing precedents must be determined by reference to the number and importance of the states adhering to each. The following are the chief agencies by which the rules of international law are commonly ascertained :—

(i) The writers of text-books.
(ii) International treaties.
(iii) Opinions invited by their own government from experts in international practice.
(iv) Declarations of law made by tribunals of international arbitration.
(v) Decisions of prize courts and similar tribunals.
(vi) Private instructions given by individual states to their armed forces, and to diplomatic representatives.

It is proposed to treat of these in order.

1. Text-Books

3. The writings of such men as Ayala, Grotius, Puffendorf, Bynkershoek, and Vattel have undoubtedly contributed greatly to the development of rules controlling the intercourse of states, and it is important to notice exactly how their influence has been exerted. In some cases, by minute historical investigation, these great jurists have influenced practice by recalling it to the channel of an almost forgotten precedent. In others they have openly advocated changes which, by their inherent reasonableness, have afterwards procured acceptance for themselves. Here, in a mediate and circuitous sense, text-books give birth to law, just as the persuasive tongue of a diplomatist may cause the adoption or abandonment of an international practice: but the real source of the law, the decisive criterion of its existence, is not the argument of the book or the speech, but the imprimatur practically supplied by international adoption. It is no doubt true that these writers have been repeatedly cited in English courts, and that their opinions

have often been judicially considered: the explanation is to be found in the presumption, inevitably drawn by English lawyers, that such authorities may be relied upon to supply a trustworthy statement of existing practice. They are cited much as Blackstone and Coke are cited, not to make legal rules, but to prove their existence, and to construe them in a doubtful case. The passage in Kent[1] is well known in which he affirms that 'no civilised nation that does not arrogantly set all law and justice at defiance will venture to disregard the uniform sense of the established writers in international law.' The truth of this remark may be unreservedly conceded. But it is quite certain that no conclusions resting upon *à priori* reasoning, and unsupported by international practice, ever have commanded the 'uniform sense' of such writers. Their unanimity will usually coincide with a reasonable unanimity, or at least a preponderating weight, of international precedent.

II. Treaties

4. We are here concerned not generally with the conventional law of nations, but with treaties as evidentiary of legal rules. For this purpose a broad classification of treaties may be usefully made into (*a*) Treaties which purport to be declaratory of existing law, or formative of new law; (*b*) Non-declaratory treaties.

(*a*) *Declaratory Treaties*

5. The value of such agreements is very high, though it will naturally vary with the influence and number of the nations who are co-signatories. If a majority of the civilised powers formally and deliberately sanction a principle, its legal character becomes definitively binding upon those who assent to the treaty, and it may be, by effluxion of

[1] *Commentary on International Law*, Lecture 1, p. 2.

time, upon other nations also.[1] The Congress of Vienna in 1815, the Declaration of Paris 1856, the Geneva Convention of 1864, the Declaration of London of 1871, the Treaty of Washington of the same year, the Berlin Congress of 1886, the Brussels Conference of 1890, and the Hague Peace Conference of 1899, all belong to the class of agreement under consideration. A declaratory treaty, which is largely adopted by influential states, will hardly be resisted for long by an isolated non-signatory, and even where the treaty is avowedly formative of new law, convenience, public opinion, and the authority of its sponsors are likely insensibly to induce acceptance.

(*b*) *Non-declaratory Treaties*

6. Under this head may be quite conveniently included all conventions between individual powers, or a number of powers falling short of a concert, to affect particularly the relations of the signatory powers. It has been often observed that such treaties ordinarily possess very little evidentiary value: indeed, they are less likely to show what the law is than what the law is not, for nations like individuals are unlikely to stipulate expressly for objects of which the law itself assures them. If two nations agree by treaty that a particular article shall be contraband, there is *primâ facie* reason for supposing the commodity to be innocent by the common law of nations. Bynkershoek[2] has grafted a reasonable qualification upon the severe common sense of this view. He points out that when a long succession of treaties between the great civilised states has stipulated for a modification of the common law, so that such a modification has in practice become almost universal, there comes a time when the original rule perishes from inanition, and is replaced by its successor. The exact

[1] The Declaration of Paris was respected by two non-signatory powers during the Spanish-American War.

[2] *Quaestiones juris publici*, L. i. c. 14, § 69.

moment of change may be difficult to determine, but illustrations of the completed process could be readily multiplied.

III. Opinions by Jurists in Answer to their own Government

7. The value of such opinions as evidence of international law is clearly somewhat one-sided. At most they can only bind the country which elicits them, and even then, if the point of submission be genuinely doubtful, the obligation is mainly conscientious. Still there are occasions when such opinions may be usefully employed by an opponent in reliance on a principle which in English law is called Estoppel. A civilised nation could scarcely act in the teeth of its own law advisers. In this country the opinions of the law officers of the Crown in international disputes certainly supply a weighty indication of English practice, and if foreign countries associate themselves with such doctrines in a more overt manner, a general rule springs up, the obligation of which Great Britain could hardly disregard.

IV. Tribunals of International Arbitration

8. In the last hundred years about thirty considerable disputes have been settled by means of arbitration tribunals. The importance which the judgments in such cases might be expected to possess has been sometimes lessened by a previous agreement on the legal points involved, leaving only the facts to be dealt with in the submission. Thus in the Geneva Arbitration the United States insisted upon a preliminary statement of the principles which were to guide the arbitrators in their consideration of the facts. Where a reference is unlimited, and the tribunal impressive, the moral weight of its decision will no doubt be considerable: third parties, of course, are in no way bound by its

conclusions, and in at least one case a party to the submission has repudiated the decision.[1]

v. Prize Courts

9. Prize courts are often called international courts, and the name is justified in so far that the law administered by such tribunals is not municipal but international. They are, however, the creatures of positive municipal law, and their decisions are binding, not through any international sanction, but because the court is seised, in the legal phrase, of the subject in dispute, and can make practically effective the jurisdiction committed to it by its own positive law. These courts are set up by belligerents to try disputes between their own subjects and the citizens of neutral states. Their decisions supply very valuable evidence of international practice, and by comparing the judgments of the prize courts of different countries on similar points, one is often enabled to arrive at positive conclusions of international law. The functions of such courts were well described by Sir W. Scott in the *Maria*[2]:—

'In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of

[1] In 1863 the United States rejected a hostile award on the British American boundary question. It is probable, however, that the Hague Peace Conference has extended the scope of international arbitration. Sir J. Pauncefote and Sir H. Howard, neither of them idealists, reported to Lord Salisbury on July 31, 1899:—

'The most important result of the Conference is the great work it has produced in its "Project of a Convention for the pacific settlement of international conflicts." That work, even if it stood alone, would proclaim the success of the Conference. It was elaborated by a committee composed of distinguished jurists and diplomatists, and it constitutes a complete code on the subject of good offices, mediation, and arbitration. Its most striking and novel feature is the establishment of a Permanent Court of International Arbitration, which has so long been the dream of the advocates of peace, destined, apparently, until now never to be realised.'

[2] 1 C. Rob. at p. 349.

my station calls for from me: namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question, if sitting at Stockholm[1]—to assert no pretension on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If therefore I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question. . . .'

10. It has been observed that the authority of prize courts rests upon municipal law. The power of dictating the grounds upon which their decision shall proceed is logically involved in this fact, and was assumed by England and France in the Napoleonic wars. The practice is unfortunate, and it may be hoped extinct, for international law was thereby menaced on its strongest side.

VI. Instructions issued by States to their Armed Forces, Diplomatic Agents, etc.

11. The practice of issuing manuals for the guidance of officers in the field was first adopted by the United States, after the American War of Secession. The Conference of Brussels was followed by a multiplication of such manuals, and instructions of this kind are now issued by Great Britain, France, Germany, and most other civilised countries. It is clear that the direct authority of a single manual may be of inconsiderable value, but if a rule is

[1] The neutral litigant was of Swedish nationality.

unanimously, or even generally affirmed in these private instructions, it is very reasonable to suppose that it has made its way into international law. The result is highly satisfactory. It is above all things desirable that the rules of war should be ascertainable, and a collation of the manuals of usage makes it possible to state with confidence many general rules on belligerent practice.[1]

[1] In the recent *Bundesrath* controversy with Germany, Lord Salisbury declined to be bound by the English Admiralty regulations.

CHAPTER II

International Status or Persons in International Law, to which is added an account of those by whom they are represented in Foreign Countries

International Persons

1. States and states alone enjoy a *locus standi* in the law of nations: they are the only wearers of international personality. This fact has been sometimes obscured by the occasions on which one state finds itself face to face with the individual citizens of another, and is permitted to assume jurisdiction over them of a *quasi* penal character, for acts not in themselves illegal. The practice is exceptional, and will be considered in its place.

The diplomatic representatives of states in foreign countries are not themselves subjects of international law, and, as Professor Holland has noticed, it is misleading to describe them as international persons. But at the same time they undoubtedly derive a reflected personality from their principals, and by this reflection their legal position is generally affected. Under these circumstances the present chapter seems to be the most convenient place for describing the privileges and duties of diplomatic agents.

2. **International States.**—A state within the meaning of international law may be described as a permanently organised society, belonging to the family of nations, represented by a government authorised to bind it, independent in outward relations, and possessing fixed territories. In detail every

society claiming admission to the law of nations must satisfy the following requirements:—

(i) It must be represented by a government which receives a *de facto* allegiance from its subjects.
(ii) It must be a sovereign independent state.
(iii) It must exhibit reasonable promise of durability.
(iv) It must possess definite territories.
(v) It must be recognised as a member of the family of nations.[1]

3. It is proposed to examine the various elements attributed above to international personality.

(i) The society must be represented by a government which receives a *de facto* allegiance from its subjects. The necessity of this requirement will be readily seen. The stability, and indeed the existence, of international relations would come to an end if negotiations with a government were liable to be interrupted by assumptions of direct control on the part of its subjects. With the refinements of *de jure* claims international law is in no way concerned. For reasons which will appear later, it is, or should be, completely indifferent to the political character which the constitution of a particular country bears. Revolutionary committees, absolute monarchs, constitutional assemblies—all these are treated alike by the practice of nations, provided that they appear to rest upon a stable basis. The reservation is necessary, and is only an application of the caution, so familiar in private law, that negotiations are unsafe with an imperfectly accredited agent.

[1] States undistinguished by the above marks are in theory beyond the pale of international law. If civilised nations observe its rules in their dealings with barbarians, it is pursuantly to the rule *Legibus soluti lege vivimus*. The English contention on the subject of Dum-dum bullets supplies a curious illustration of this fact. The retention of the bullet was defended because it was found necessary to check the onslaughts of savage enemies. The legitimacy of the plea may be admitted on moral as well as legal grounds, if an equally effective and less barbarous check is unknown.

4. (ii) The society must be a sovereign independent state. This requirement is fundamental in modern international practice. It is, however, in no way essential to the conception of jural relations between states; it was little in harmony with the hierarchical bias of mediævalism, and if a law had come into existence at a particular epoch in European history, Mr. Hall truly observes,[1] 'It must have involved either a solidification of the superiority of the Empire, or legislation at the hands of the Pope.' The *rationale* of this requirement does not differ materially from that of the last. The least degree of dependence upon a superior excludes finality of obligation, and is therefore fatal to the claims of the dependent state. The relations between the South African Republic and this country illustrate this form of disability. Whether the aggregate of those relations was properly described as a 'suzerainty' or not, is a mixed question of history and political science with which we are not called upon to deal. It is, however, important to notice that facts, which they did not and could not dispute, were fatal to the contention put forward by President Krüger and his State Secretary. A nation cannot indefinitely surrender the treaty-making power to another, and at the same time keep alive its claim to be a sovereign international state.

5. **Protectorates.**—The case of a protectorate sometimes raises nice questions: here it is evident that the view taken must depend on the degree of intimacy subsisting between the protecting and the protected states. A convenient evasion of the difficulty describes the position of the protected state as one of qualified or imperfect personality. During the Crimean War the Ionian Islands were under the protectorate of Great Britain. The case is a strong one, because the internal and external affairs of the islands were both controlled by this country, yet their neutrality was scrupulously respected throughout the war. The explanation may be that the immunity from attack was conventional, for agreements were concluded by

[1] *International Law*, ed. II. p. 19.

this country with Austria, Russia, and Prussia, and that the effect of these conventions reacted upon the decisions of prize courts. It is certain that such a neutrality would not be respected for a moment if the protecting state derived any belligerent advantage from his occupation. It is not obvious that any characteristic attribute of personality survives to a state whose executive and foreign relations have passed into other hands, and it might be less misleading to note the claim to neutrality as exceptional, than to magnify a *scintilla juris* by such a description as imperfect personality. It may be further observed that if one of two belligerents was likely to derive any advantage from attacking a state, protected and controlled internally and externally by the other, it is not clear on what principle he is bound to abstain from doing so: the protected state has made a surrender of all that is essential to national character, and the claim to respect an independence which has become purely nominal is little likely to impress practical statesmen.[1] The position of a state under suzerainty does not differ in international theory from that of an individual state in a federal system.[2] The mouthpiece, so to speak, is elsewhere. Thus the United States collectively form an international person, though none of the individual states does so. On the other hand, in the case of a personal union such as that which subsisted between Great Britain and Hanover from 1714 to 1837, 'the states so connected are properly regarded as wholly independent persons who merely happen to employ

Cf. the Cherokee Nation *v.* State of Georgia, 5 Peters Reports 1.

[2] The international position of Egypt is curious. Nominally a vassal state of the Sultan's, it has, in fact, become a part of the British Empire. It is immaterial whether the occupation will be, or ought to be, permanent or temporary. Egypt possesses to-day hardly a single element of international character, and neither the outward deference paid to European susceptibilities, nor the shadow of control still enjoyed by the international courts, can disguise the real facts. It may be noticed in passing that any other view would open up highly difficult questions as to the territories lately conquered from the Khalifa by Egyptian troops officered by Englishmen.

the same agent for a particular class of purpose, and who are in no way bound by, or responsible for, each other's acts.' [1]

6. **Confederations.**—A difficulty, chiefly of analysis, is presented by the case of a Staatenbund, or confederation of states like the German Bond which lasted from 1815 to 1866. Such a union is to be distinguished from a federal system, for which it has sometimes prepared the way, where the central authority is clearly the only international person. The principle which should control such cases appears to be clear. If the constituent nations have reserved the right of controlling their foreign affairs, and have merely shackled their independence of action by revocable conventions, there is no loss of status. As far as outsiders are concerned, it is *res inter alios acta*. The ruling analogy is that of an ordinary alliance such as the Triple Alliance. If on the other hand, the position is such that on questions of high policy third parties address themselves to the central authority, the confederate nations individually suffer a loss of international status. The question is always one of fact.

7. (iii) The society must exhibit reasonable promise of durability.

The promise of durable existence must obviously precede international recognition. The question when such recognition ought to take place becomes pressing when a new state is called into existence. Such new birth usually takes place in one of three ways.

1. Previously uninhabited districts are colonised, and a political society organised in them.
2. Associations of men originally non-political change their character, and form themselves into a state.
3. A people hitherto dependent on another asserts its independence by a successful revolt.

Instances of the first mode will occur at once; the cases of the Congo Free State and the Barbary States will illustrate

[1] Hall, ed. 2, p. 26.

the second; it is in the third case that international difficulties have been most seriously felt. The gulf between the declaration of independence and its vindication is often considerable: at what point may the claim to national existence be recognised by a genuinely indifferent neutral? The principle is as clear as its application is sometimes difficult. The definitiveness of a new accession to the family of nations may be recognised by neutrals when it has become reasonably evident that the attempt to subdue the revolt is doomed to permanent failure. The recognition of the American Colonies by France in 1778 was an unfriendly act, inasmuch as the issue of the attempt to subdue them was still highly doubtful: on the other hand, the caution which the United States and Great Britain showed in admitting the claims of the revolting Spanish American colonies, in the early part of the last century, furnishes an instructive instance of correct deliberativeness. The recognition may take place formally by treaty, or informally by the interchange of diplomatic representatives.

8. (iii) The society must possess fixed territories.

The framework of international law was formed at a time when men's minds were dominated by territorial ideas, and practice has grafted no exception on the above requirement. A nomadic people could offer no security for the fulfilment of its obligations, and in fact there would be little temptation to form contracts with them.

9. (iv) The society must be a member of the family of nations.

It is difficult to indicate with precision the circumstances under which such admission takes place in the case of a nation formerly barbarous. The assimilation of European ideas, the growth of humane habits, the frank attempt to break down the barriers of exclusion, all these will insensibly prepare the way. Japan may be considered to have fully established her claim to be recognised as a subject of international law. Precipitancy in admission is to be deprecated, and it is food for reflection that the Treaty of Paris in 1856

admitted Turkey to share in the advantages of the system of Europe.

10. **Theory of Equality.**—In international as in municipal law the units are conceived of as equal. The equality of all citizens before the law is axiomatic in civilised systems, and the doctrine has received much verbal allegiance from statesmen on the larger stage of international relations. Sir Henry Maine[1] traces its origin to the old confusion between *jus gentium* and *jus naturæ*. If the society of nations is governed by natural law, the atoms which compose it must be absolutely equal. Men under the sceptre of nature are all equal, and accordingly commonwealths are equal if the international state be one of nature. 'The proposition that independent communities, however different in size and power, are all equal in the view of the law of nations, has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age.'[2]

The influence for good which Sir H. Maine attributes to the theory of equality is a striking instance of the effect of idealism on the world's history. Nothing can be more certain than that the theory, in municipal law truistic, is, when applied to the position of states, inept and misleading. When we affirm that in England all men are equal before the law, we mean that the meanest peasant may litigate in equal terms with a powerful nobleman; what place can such a theory have in a system of self-redress? Can it be said without absurdity to a small state injured by a great one, 'Your cause is just: be not concerned at the poverty of your resources: in international disputes all states are equal: war, however, is the only litigation we know, and equality ends when you enter its court'?

The fiction has no doubt reacted upon international sentiment, and in this way prevented much wrongful aggression; but it must be noted that it has little correspondence with the facts of international life, and that on the rough and

[1] *Ancient Law*, pp. 100, 101. [2] *loc. cit.*

ready practice of nations suit *in formâ pauperis* is not a hopeful procedure.

11. **Neutralised States.**—The state of neutralisation illustrates an abnormity of type in international character which may most conveniently be considered here. A neutralised nation is one which is prohibited indefinitely, or for a considerable period, from carrying on war except in its own defence. It is, so to speak, bound over to keep the peace: the prohibition must proceed from the general body of nations, for a particular state cannot of its own accord cut itself adrift from the ordinary incidents of international character. Neutralisation is easily distinguished from neutrality. It is normally permanent, general, and involuntary, whereas neutrality is temporary, particular, and voluntary. The three instances of neutralisation usually cited are those of Switzerland, Belgium, and Luxemburg. In 1815 Great Britain, Austria, France, Prussia, and Russia asserted the perpetual neutrality of Switzerland, and pledged themselves to maintain the integrity of its territories. In 1839 the same powers asserted the independence and neutrality of Belgium. Both countries have scrupulously observed the conditions of their peculiar position, and no attempt has been made to violate the independence of either. It is noticed by Mr. T. J. Lawrence[1] that Belgium was not permitted to assent to the neutralisation of Luxemburg in 1867, on the ground that such assent involved the assumption of responsibilities inconsistent with her own international limitations. A practical question is suggested by the dispute between Prince Bismarck and the inhabitants of Luxemburg during the Franco-Prussian war: what is the remedy against a neutralised state for a refusal to redress international injuries? In strictness the aggrieved party should lay his complaint before the guaranteeing powers and request them to procure satisfaction: in practice he would probably take this course, reserving a claim to act for himself if satisfaction were not forthcoming. If the occasion called peremptorily

[1] *International Law*, p. 489.

for immediate redress, it can hardly be doubted that a powerful nation would take the law into its own hands.[1]

12. **Chartered Companies.**—From what has been said above, it will be clear that strictly speaking a chartered company has no claim whatever to international status. The facts perhaps are hardly so clear as the theory. These great corporations have played a part so extraordinary in the history of the world; they have exercised jurisdiction of so high a kind, and with such immunity from supervision; that it is impossible to put them on one side with the observation that they are merely trading companies, and that their character is therefore extraneous to the subject of international law. A juster, and certainly a more convenient view, is to conceive of a chartered company of the normal type as enjoying a delegation of sovereign power over a defined area. The terms of the delegation concern only the company, and the nation whence the authority proceeds. It is sufficient to third parties to know that a political act of the company is *prima facie* the act of the country to which it belongs, and that redress may be sought from that country for wrongs done by the company. So much seems to be involved in general principle. A nation cannot commit political functions to associations of its citizens and then disclaim responsibility for their abuse. The degree of satisfaction is very likely to vary according to the position of the injured party, but it is hardly credible that a first-class power injured by a chartered company would acquiesce in a lower degree of satisfaction from the accrediting state than if the latter had directly been the aggressor. The temptation to employ chartered companies is obviously great. The administration of the East India Company was stained by much that was discreditable, but it none the less rendered splendid service to this country, and perhaps in the long-run to humanity as well. Yet the objections must not be overlooked. Many of the defects in company government

[1] Bismarck threatened to disregard the neutrality of Luxemburg on the occasion referred to in the text.

pilloried by the noble eloquence of Fox and Burke were no doubt particular and accidental, but some of them are permanently inherent in the system. Government by chartered company necessarily subordinates the social organism of the district under control to trading considerations. In no other branch of English public law would a government be tolerated which avowedly existed for purposes of exploitation. It is undoubtedly true that pioneer work of incalculable value has been done by such companies in the past, and occasions may recur when their employment is the least of competing evils, but imperial and economical tastes are not gracefully associated, and the era of chartered companies should at most be a phase in the work of reclamation.

13. **The Representatives of States in Foreign Countries.**—This subject is generally considered under the head of international rights: an arrangement supported by a supposed right of legation. The claim appears somewhat academic: in theory one state could hardly insist that another should accredit ambassadors to it. No doubt the withdrawal of an ambassador usually precedes an outbreak of war: but antecedent differences and not the withdrawal are the *causæ causantes* of the war. On the other hand, no two states could in practice refuse to interchange representatives in time of peace: such intercourse is imperatively demanded by mutual convenience.

The precedence of diplomatic and other agents resident in foreign countries was determined by the protocols of the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818. It is as follows:—

1. Ambassadors, legates, and nuncios.
2. Diplomatic ministers particularly accredited to sovereigns.
3. Resident ministers accredited to sovereigns.
4. Chargés d'affaires accredited to foreign bureaux.
5. To the above list must be fifthly added those who discharge consular functions.

Notwithstanding the nice gradations of this hierarchy, a sufficient account of the subject can be given under the two heads of (1) ambassadors; (2) consuls.

(1) *Ambassadors*

14. The practice of sending ambassadors to reside at foreign courts seems to date from the Reformation. The passage from Coke has been often cited in which he says that Henry VII. of England 'would not in his time suffer Lieger ambassadors of any foreign king or prince within his realm, or he with them, but upon occasion used ambassadors.' So Grotius[1] affirms that a nation is not bound to receive resident embassies, for such are unknown to ancient practice.

It is often somewhat largely stated that an ambassador enjoys the privilege of exterritoriality. By this is meant, or should be, that though *de facto* resident in the country to which he is accredited, his position *de jure* is regulated on the supposition that he still resides in his own country. It is more accurate, though less dramatic, to say that certain immunities from the jurisdiction of municipal courts are conceded to ambassadors by the practice of nations. These immunities may be considered under two heads:—

(*a*) Immunity from the criminal jurisdiction of the country to which the agent is accredited.

(*b*) Immunity from the civil jurisdiction of the country to which he is accredited.

(*a*) Under no circumstances can an ambassador be tried for a criminal offence in the country to which he is accredited. The practice is well settled, and has been established in England since the case of Mendoza, the Spanish ambassador, who conspired to dethrone Queen Elizabeth. Nor can he be arrested under ordinary criminal process:[2] he may, however, be arrested by a high assertion

[1] ii. 18. 3., cited by Woolsey, *Introduction to International Law.*

[2] Case of the Dutch ambassador and the Landgrave of Hesse Cassel, 1763.

of sovereign power for intriguing against the country in which his mission lies. Thus Count Gyllenbourg, the Swedish ambassador in 1717, was detained for some time in an English prison for plotting against the Hanoverian dynasty.[1] The French Government in 1718 arrested Prince Cellamare, the Spanish ambassador, on a similar charge. The case of Pantaleon Sa[2] is hardly consistent with modern practice. Sa was the brother of the Portuguese ambassador accredited to the Commonwealth: under outrageous circumstances he, or men acting under his direction, killed one person and wounded several others, and for this offence he was indicted, tried, and executed. The accepted view in later times is that the privileges of an ambassador are shared by his family living with him, and by his official and domestic suite.[3] The correct course when an ambassador is suspected of criminal acts was indicated so long ago as 1571, in an opinion which Gentilis and Hotman were asked to give in Mendoza's case. He must be handed over to the authorities of his own country. The claim that an ambassador's house is a 'city of refuge' to criminals, which would be strictly involved in the exterritorial theory, has long been generally abandoned in practice.[4] It died hard in Spain, if indeed it may even now be pronounced extinct there, and it still appears to survive in the South American Republics. A diplomatic agent cannot be compelled to give evidence before a criminal court in the country of his sojourn: the immunity, however, is waived in a proper case, and the refusal to do so has been held to justify a demand for the agent's recall.[5]

(*b*) *Immunity from Civil Jurisdiction*

15. The English common law seems to have allowed

[1] De Martens, *Causes Célèbres*, i. 101.
[2] Phillimore ii. 211.
[3] See Parkinson *v.* Potter, L. R. 16, Q. B. D. 152.
[4] Cases of the Duke of Ripperda and of Springer: De Martens, *Causes Célèbres*, i. 101.
[5] Halleck, i. 294.

no such immunity to ambassadors. There is a dictum in Coke against the claim, but the law apparently remained uncertain until 1708. In that year the Czar's ambassador in London was arrested for a debt of £50.[1] A criminal information was entered against those responsible for the arrest. While the point of law was still under consideration the statute 7 Anne, c. 12 was passed. The Act, which was in form declaratory, provided by section 3 That all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador . . . of any foreign prince . . . received as such by her Majesty, or the domestic servant of such ambassador . . . may be arrested or imprisoned or his goods or chattels be distrained . . . shall be deemed utterly null and void. By section 4 attorneys suing such processes were made liable to punishment. Section 5 provides that the immunity of an ambassador's servants is forfeited by their occupation in trade. On this statute it has been held [2] that a person claiming the benefit of this Act as domestic servant to a public minister must be really and *bona-fide* the servant of such minister at the time of the arrest. The privilege is that of the ambassador not of the servant.[2] The court will not compel a foreign ambassador to give security for costs.[3] A public minister particularly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions.[4]

The United States Congress in 1890 passed an act of a similar scope,[5] and continental practice has been almost uniformly favourable to the claim in its most generous form. It may be mentioned here in passing that ambassadors enjoy no exceptional privileges at the hands of third persons or

[1] Phillimore ii. 228.

[2] Fisher *v.* Begves, 2 C. and M. 240.

[3] Duke de Montellano *v.* Christian, 5 M. and S. 503.

[4] Magdalena Navigation Company *v.* Martin, 26 L. J., Q. B. 210. See also Parkinson *v.* Potter, 16 Q. B. D. 152.

[5] *Cf.* Dupont *v.* Pichon, 4 Dall, 321.

enemies. This rule was long ago stated by Bynkershoek,[1] 'Non valere jus legationis nisi inter utrumque principem qui mittit legatos et ad quem missi sunt: cætera (eos) privatos esse.' Practice has been in accord with this statement of the rule. A well-known instance was the arrest in 1744 of Marshal Belleisle, the French ambassador, while on his way through Hanover, during the Franco-English war.

16. **Duties of Diplomatic Agents.**—The duties which such agents owe to their own countries hardly concern us here, but are a branch of the public law of the state to which they belong. Ambassadors, however, are forbidden by rules which are most jealously enforced, from any association, direct or indirect, with the public affairs of the country to which they are accredited. Mr. Hall[2] collects the instances in which violations of this rule have been followed by a request to the accrediting state to recall, or in an extreme case by dismissal. A well-known instance of dismissal occurred in 1888, when Lord Sackville, the English ambassador at New York, was given his passports and required to leave the country within three days. Lord Sackville had been asked to advise an unknown correspondent of English extraction and sympathies, how to vote in the Presidential election of that year. He replied suggesting in a general way that the then government was friendly to this country, whereas Mr. Cleveland's intentions were unascertainable. The letter may have been an indiscretion, but, as Mr. Hall observes, 'it was treated as an open and international offence.'

(2) *Consuls*

17. The term international agent should mean one who is a link in a chain of communication between two states. In this sense a consul is not, as such, an international agent. He is an official of the country for which he acts, intrusted with duties of a multifarious kind in a foreign country, and permitted by that country to discharge

[1] Cited by Woolsey. [2] P. 319.

them within its borders. The permission involves certain privileges, the concession of which is somewhere along the border line between courtesy and law. He has not, indeed, any immunity from the ordinary tribunals,[1] though their jurisdiction is asserted so as to inconvenience him as little as possible in the discharge of his duties. In the United States practice is similar,[2] though American policy has added considerably by treaty to the functions and immunities of the consular service. The liability of a consul to be arrested is inconvenient, and if suddenly exercised might be very prejudicial to members of the state for which he acts. The point was considered in this country in the case of Clarke *v.* Cretico,[3] when Mansfield, C. J., observed at page 107:—

'The office of consul is indeed widely different from that of an ambassador, but still the duties of it cannot be performed by a person in prison. . . . The words of the statute[4] are: "Ambassador or other public minister." But a consul is certainly not a public minister. In Viveash *v.* Becker[5] Lord Ellenborough summed up the matter as follows: "Nobody is disposed to deny that a consul is entitled to privilege to a certain extent, such as for safe-conduct, and if that be violated the sovereign has a right to complain of such violation. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the Act of Parliament which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried." It appears to me that a different construction would lead to enormous inconveniences, for there is a power

[1] Viveash *v.* Becker, 3 M. and S. 284.
[2] The Anne, 3 Wheat. 435.
[3] 6 Taunt, 106.
[4] 7 Anne, c. 4.
[5] 3 M. and S. at page 297.

of creating vice-consuls; and they too must have similar privileges.'

The general force of these arguments is great: the practice is common of choosing consuls from among the natives of the particular country in which their services are required, and it would be intolerable that men so appointed should be protected from the jurisdiction of their own tribunals. But though he may not be 'entitled to the *jus gentium*,' certain privileges are in practice conceded to a consul. He is allowed to place the arms of his country over his house; he is immune from personal taxation, and from liability to jury service; soldiers may not be billeted upon him, and his house is inviolable in time of war. We are not here concerned with the modes in which consuls are appointed, but it must be noticed that they cannot enter upon their duties until authorised to do so by an exequatur issuing from the country in which their duties lie. An exequatur is a more or less formal authorisation to do, within the jurisdiction of the country, granting it the different acts incidental to consular authority.

18. **Duties of Consuls.**—The duties of consuls are of a very various character, and can only be generally indicated. In the first place, as commercial agents, they are bound to succour tradesmen and sailors of the country by which they are employed: more generally, its citizens are entitled to look to their consul for advice and countenance in any of the innumerable difficulties which spring up among foreign surroundings. Consultative duties are among the most useful of those which fall upon consuls, and much invaluable knowledge is derived from the commercial reports which they are in the habit of submitting periodically to their governments. Still more important are the judicial functions which they are permitted to discharge. These may be arranged under three heads in an ascending order of importance.

(i) The verification of births, marriages, and deaths, and the administration of intestate estates abroad among citizens of the country for which they act.

(ii) The exercise, within the limits locally conceded to them, of a disciplinary jurisdiction over merchant sailors of the employing state, and the decision, as arbitrators appointed by consent, of commercial disputes among its citizens.

19. (iii) In non-Christian and partially civilised states the consuls of civilised powers exercise by consent a very responsible jurisdiction. They are the judges, generally speaking, in all matters civil and criminal which concern their countrymen. The chief countries in which immunity from the local jurisdiction still survives are Turkey, Siam, and China. In these countries the practice is to try offences by natives against foreigners in the local court, by foreigners against natives in the consular court of the defendants, and in the court of the defendant's consul where the parties are foreigners of different nationality. The exemption from jurisdiction must be regarded as conventional where the country in which it is asserted is a member of the family of nations: as an extension of the national jurisdiction, comparable to that claimed on the high seas and in savage countries, when it is not. In England this jurisdiction now rests on the Foreign Jurisdiction Act 1890.[1] Sections 1, 2, 3, of that Act are as follows:—

1. It is and shall be lawful for her majesty the queen to hold, exercise, and enjoy any jurisdiction which her majesty now has, or may at any time hereafter have, within a foreign country in the same and as ample a manner as if her majesty had acquired that jurisdiction by the cession or conquest of territory.

2. Where a foreign country is not subject to any government from whom her majesty the queen might obtain jurisdiction in the manner recited by this act, her majesty shall, by virtue of this act, have jurisdiction over her majesty's subjects for the time being resident in or resorting to that country,

[1] 53 and 54 Vict. c. 37.

and that jurisdiction shall be jurisdiction of her majesty in a foreign country within the meaning of the other provisions of this act.

3. Every act and thing done in pursuance of any jurisdiction of her majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.

Similar provisions for the regulation of American consular courts are contained in an Act of Congress passed in 1860. The mixed tribunals in Egypt supply an instance of a jurisdiction originally falling within this class, and now kept alive for political reasons.

It will be apparent that these judicial duties demand a high degree of knowledge and competence for their proper discharge: and it may be hoped that the tendency will grow for nations to engage at every important centre their own subjects in consular employment, excluding them at the same time from private trade. Under such conditions it would probably be found practicable to extend the immunities of consuls to the point rather prematurely assumed by Heffter,[1] when he affirms that they enjoy 'that inviolability of person which renders it possible for them to perform their consular duties without personal hindrance.'

[1] § 244.

PART II

THE RIGHTS AND OBLIGATIONS OF STATES IN TIME OF PEACE

When we speak of a state as enjoying a right to do a certain act, we mean that the public opinion of other states will view the doing of that act with approval, or at least with acquiescence. Correlatively, a state lies under an obligation to do or forbear from a certain act when its omission to do, or non-forbearance from doing, will be viewed with disapproval and perhaps by an attempt to compel. Such rights and obligations are, of course, distinguishable from those of municipal law, which are enforced, if necessary, by the strong arm of society. In this limited sense of the words a consideration of the rights and obligations of states in peace, war, and neutrality forms a convenient method of exhibiting the whole subject of international law.

CHAPTER I

Independence

1. The statement that nations have a right to their independence is elementary and need not be elaborated. The principle has been often violated, but its immense practical influence can hardly be overstated. The sentiment of nationality, which in our own time called into being the kingdoms of Italy and Greece, and which combined with political considerations to effect the unification of Germany, depends on the assumption that men of one race should enjoy an independent government of their own.

It is less easy to state positively the constituent rights which, taken together, amount to independence. Mr. W. E. Hall has laid it down in general language[1] that 'independence is the power of giving effect to the decisions of a will which is free, in so far as absence of restraint by other persons is concerned. The right of independence, therefore, in its largest extent, is a right possessed by a state to exercise its will without interference on the part of foreign states, in all matters and upon all occasions with reference to which it acts as an independent community.' The last limitation is made necessary by the fact that 'a state is capable of occupying the position of a private individual within foreign jurisdiction, as, for example, in the case of England, which holds shares in the Suez Canal Company.'[2] Mr. T. G. Lawrence[3] defines independence as 'the right of a state to manage all its affairs, whether external or internal, without interference from other states as long as it respects the corresponding right possessed by each fully sovereign member of the family of nations.' Both these definitions or descriptions are of a general character, and may require to be strictly modified in practice, but the essential conception is familiar, and therefore readily grasped. An independent state is entitled to live its own life in its own way, the sole judge within the law of its domestic government and its foreign policy. The particular form of government which it has chosen in the working out of its national destiny concerns itself and itself alone, for every independent state has the right of setting its own house in order. In asking how far these incidents are found at present in states claiming to be independent, it must be remembered that here, as elsewhere, authoritative international practice must be regarded, and not the repetitions of text-books. A consideration of the history of Europe and the American continents in the present century will make it clear that the rights to independence

[1] *International Law*, ed. 2, p. 50.
[2] *U.S.*, p. 50, footnote.
[3] *International Law*, p. 111.

can only be claimed for many nominally independent communities with substantial qualifications.

2. Phillimore summarises the rights incident to independence as follows: [1]—

1. The right to a free choice, settlement, and alteration of the internal constitution and government without the intermeddling of any foreign state.
2. The right to territorial inviolability, and the free use and enjoyment of property.
3. The rights of self-preservation, and this by the defence which prevents, as well as by that which repels, attack.
4. The right to a free development of national resources by commerce.
5. The right of acquisition, whether original or derivative, both of territorial possessions and of rights.
6. The right to absolute and uncontrolled jurisdiction over all persons and things within, and in certain exceptional cases without, the limits of the territory.

The same writer derives from 'membership of a universal community' of nations four other rights which may, at least as conveniently, be also referred to the principle of independence.

7. The rights of a state to afford protection to her lawful subjects wheresoever situate.
8. The right to the recognition by foreign states of the national government.
9. The right to external marks of honour and respect.
10. The right of entering into international covenants or treaties with foreign states.[2]

The points indicated in this summary afford a fair account of the rights involved in independence. It is in fact an abstract right limited firstly by the maxim, *Sic utere tuo ut alienum non lædas*, secondly, by the existence of similar

[1] *International Law*, vol. i. p. 162.
[2] *U. S.*, p. 163.

rights in other nations, and thirdly, by the possibility that it may come into conflict with a competing principle to which it is bound to give way. The right to violate the independence of a nation is known as the right of intervention, and a consideration of the occasions when intervention is permissible will most usefully illustrate the inroads which practice has made upon independence.

3. **Intervention.**—'Neither,' says Lord Bacon,[1] 'is the opinion of some of the schoolmen to be received that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war.' This is the principle upon which intervention must ultimately depend. Where 'there is a just fear of an imminent danger,' or, rather more strongly, where the vital interests of a state are gravely menaced, the paramount principle of self-preservation comes into play. If a neighbouring country swells its armaments to a degree not to be reconciled with the simple aim of self-defence, if the preparations from the nature of the case can only be directed against one object, the community menaced may strike at its own time, without awaiting further provocation. International law is at its weakest, and its writers are least convincing, on the subject of intervention. The maxim, *Nemo potest judex esse in re sua*, has no place in the law of nations, and the interested nation itself decides on the extent of provocation, and the imminence of peril. Under these circumstances it is not surprising that the line between policy and law is slightly drawn, so that high-handed acts of aggression have been able to masquerade under the name of intervention. The danger of a rule is apparent which would permit one nation to interfere in the concerns of another in order to prevent the wrongful intervention of a third, being itself the only judge of the likelihood of such intervention and of its moral or legal justifications. It seems possible to base upon the modern practice of nations

[1] *Essay on Empire.*

a simple and more exclusive statement of the occasions on which intervention is permissible. It may be defended on two occasions only:—

1. When it is made necessary by self-preservation.
2. When it is undertaken by the general body of Powers.

4. (1) **Self-preservation.**—Every claim to intervention on these grounds must be judged on its own particular facts. To deal uncontroversially with highly controverted facts, the truth is elementary that Great Britain would have been legally justified in intervening to prevent the further armament of the Dutch Republics, assuming that such armaments clearly exceeded the limits of proper self-defence.[1] Whether the possibilities opened up by the Jameson Raid, and the revolutionary schemes imputed to Johannesburg, raised the requirements of legitimate self-defence high enough to justify the extraordinary elaborateness of the Boer armaments, is a question which different persons will no doubt answer differently. The principle at least is clear. A further illustration may be drawn from the war in which this country became involved in consequence of the French Revolution. *Primâ facie* France in 1792 was as much entitled to enjoy an uninterrupted revolution as England in 1688. The legality of the intervention must stand or fall with the seriousness or otherwise of the apprehension that an aggressive propagandism of revolutionary principles was contemplated by the French Convention. No doubt the danger was exaggerated, but the *rédaction* of November 19, 1792, is still on record:—'La Convention nationale declare qu'elle accordera secours à tous les peuples qui voudront recouvrer leur liberté et elle charge le pouvoir exécutif de donner des ordres aux généraux des armées Francaises pour

[1] *Cf.* Bismarck's intimation to Lord Loftus, July 13, 1870: 'I am positively informed that France has been and is now arming. If this go on, we shall be compelled to ask the French Government for explanations.'—*Our Chancellor*, Busch., vol. ii. p. 55.

secourir les citoyens qui auraient été ou qui seraient vexés pour la cause de la liberté.' It is easy to say now that the menace was never more than verbal, but it must have appeared terrible enough to those who viewed with deepening apprehension the conceptions of *la liberté* which were growing in French favour.

5. **The Holy Alliance.**—The doctrine under consideration was pushed to wholly inadmissible lengths by the Holy Alliance, the pretensions of which are of great historical interest, because out of them sprang by revulsion the Monroe Doctrine. The parties to this understanding were the rulers of Russia, Austria, Prussia, and France. Setting aside the idealist tinge contributed by the dreamy mind of the Emperor Alexander, the objects of the Alliance as developed at the Congresses of Aix-la-Chapelle, Troppau, and Laybach were clear enough. A circular issuing from Austria, Russia, and Prussia alleged the existence of 'a vast conspiracy against all established power, and against all the rights consecrated by that social order under which Europe had enjoyed so many centuries of glory and happiness.' . . . 'They regarded as disavowed by the principles which constitute the public right of Europe all pretended reform operated by revolt and open hostility.' Lord Castlereagh's despatch in reply[1] has been often referred to: such principles 'were adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different states . . . though no government could be more prepared than the British Government was to uphold the right of any state or states to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another state. It regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby. . . . The British Government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circum-

[1] January 19, 1821.

stances of the case: but it at the same time considered that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into . . . the Institutes of the Law of Nations.'

6. **The Monroe Doctrine.**—In 1823 the powers to whom the despatch was addressed had under consideration the propriety of helping Spain to subdue her rebellious South American colonies. Proposals were actually made to hold a congress to consider South American affairs. Mr. Canning, then Foreign Minister of Affairs, suggested to the American minister in London that any attempt by Europe to decide the fate of states, so nearly connected with the United States by community of geographical and political interest as the South American Republics, ought to be most jealously watched. Out of this suggestion arose the celebrated Monroe Doctrine, which was embodied in the annual message of President Monroe in 1823. It contained two distinct statements:—

1. 'It is a principle in which the rights and interests of the United States are involved that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for colonisation by any European power.

2. 'With the existing colonies and independences of any European Power we have not interfered and we shall not interfere, but with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principle acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States.'[1]

7. The lawyer is not concerned with the wild speech of President Grant in 1870: 'He hoped that the time was not far distant when in the natural course of events the European

[1] See an article on the historical origin of the Monroe Doctrine in the *Times* for January 8, 1896.

connection with the continent would cease,' but need only notice the attempts which have been made to treat the doctrine as a part of international law, and inquire how far they can be supported. Putting on one side the self-denying ordinance which precludes America from interference with European questions, two principles are contended for, which may be respectively termed :—

1. The non-colonisation principle;
2. The non-intervention principle.

It is material to notice that the assertion of each was elicited by particular circumstances: the first by a Russian attempt to acquire the North-West Territory, the second by the designs of the Holy Alliance. In 1895, however, in his message to Congress of December 17, 1895, President Cleveland observed of the doctrine: 'It may not have been admitted in so many words to the Code of International Law: but since in International Councils a nation is entitled to the rights belonging to it, if the enforcement of the Monroe Doctrine is something we may justly claim, it has its place in the Code of International Law as certainly and surely as if it were specifically mentioned.' A more completely circular argument was never devised, and the greatest American writer in international law[1] has taken the other view strongly: 'The declarations are only the opinion of the Administration of 1823, and have acquired no legal form or sanction.' On the other hand, they have often been insisted upon by American statesmen, and have become more and more a settled principle of American policy.[2] In 1824, when a general negotiation was in progress between this country and the United States, the assertion by the latter of the non-colonisation principle was met by a refusal on the part of Canning, who represented this country, to proceed any further in the Anglo-American controversy with Russia. The English view was unequivo-

[1] Dana, note to Wheaton, § 67, note 36.

[2] Strangely enough, the doctrine has never been directly affirmed by either the Senate or House of Representatives.

cally placed on record that Great Britain considered the whole of the unoccupied parts of America as being open to her future settlements in like manner as heretofore.

8. **Venezuela.**—It is, however, on its intervention side that the doctrine has attracted most attention. The American contention in the Venezuela negotiations in 1895 far exceeded the scope hitherto claimed by the most extensive commentators on President Monroe's message. A long-standing dispute between Great Britain and Venezuela as to the proper boundary between the Republic and British Guiana became acute in 1895. The British claims were finally affirmed in the form of an ultimatum. Venezuela, it need hardly be said, is a sovereign independent state. Under these circumstances appeared the message of President Cleveland. The material portions of the message were as follow:—

'The balance of power is justly a cause of jealous anxiety among governments of the Old World, and a subject for our absolute non-interference. None the less is the observance of the Monroe Doctrine a vital concern for our people and their government. . . . If an European power, by an extension of its boundaries, takes possession of the territory of one of our neighbouring republics against its will and in derogation of its rights, it is difficult to see why, to that extent, such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. . . . The dispute has reached such a stage as to make it now incumbent upon the United States to determine, with sufficient certainty for its justification, what is the true divisional line between the Republic of Venezuela and British Guiana. . . . I suggest that Congress make an adequate appropriation for the expenses of a commission, to be appointed by the Executive, which shall make the necessary investigation and report upon the matter with the least possible delay. When such report is made and accepted, it will, in my opinion, be the duty of the United States to resist, by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory which, after investigation, we have determined of right to belong to Venezuela.'

9. If the claims here made are sanctioned by acquiescence so as to become a portion of international law, the doctrine of equality may be finally banished from our text-books, to be replaced by a legal hegemony on the part of the United States over the whole of the American continents. It is involved in the American claim that no European nation can exact redress from a South American Republic in the only manner in which a demand for redress is likely to be at all effective. Powerful European nations are not likely to acquiesce in a view which in effect concedes national character to these states while exonerating them from its correlative responsibilities. Nor is it to be supposed that the sane judgment of thoughtful Americans will insist on a view so extreme: it is, however, not impossible that political exigencies may in time compel the United States to declare a protectorate over the South American Republics. Such a step, whatever its political aspects, would at least clear the legal atmosphere, and would effectually meet the legitimate American aversion to a violent European irruption into the New World. Until such a change takes place, the lawyer may dismiss the doctrine with the comment that in its most moderate form it involves an enormous addition to the commonly received conception of the rights conceded to self-preservation.

2. Second Ground of Intervention

10. **The Concert of Powers.**—It was stated that intervention was permissible, in the second place, when undertaken by the general body of civilised states in the interests of general order. This ground of intervention is often ignored by writers who acknowledge much more disputable justifications. No writer who derives his views of law from the practice of states, and not from theoretic reasoning, can refuse to admit it. It has been repeatedly asserted, and its exercise has not been questioned during the present century.[1] The international

[1] See the very sensible observations of Mr. T. G. Lawrence, *Principles of International Law*, second edition, pp. 242, 243.

birth of Greece in 1832 was the result of a European intervention in the affairs of Turkey; the petulant childhood of the kingdom thus called into existence was systematically regulated by the Concert of Europe, and under the same tutelage Greece has received periodic accessions of territory at the expense of Turkey. By a similar exercise of jurisdiction the independence of Belgium was extorted by the great powers in 1830 from the King of Holland, and in 1878 a conditional independence was bestowed upon Montenegro, Roumania, and Servia. On each of these occasions the act was clearly one of intervention: the jurisdiction is thus established in practice, and is not objectionable in theory. Unanimity of the great powers is the best guarantee against individual self-seeking.[1]

[1] Developments in the Far East make it impossible to limit the activity of the concert of powers to European complications. At the time of writing (June 23, 1900) a highly interesting experiment is in progress in China, where it seems probable that the protocol *de désintéressement*, in which the powers are believed to have concurred, will be subjected to severe strain. An admirable statement of the conditions on which concerted intervention depends was made by M. Delcassé in the French Chamber on June 11. The French minister observed:—

'For the second time recently the legations have been obliged to demand troops of the naval commanders. The common peril dictates resolutions to the powers. I do not know if they have divergent views, but the affirmation of their solidarity is the surest guarantee for the safety of each. The powerlessness of the Chinese Government to suppress an insurrection which does not appear to inspire it with either fear or surprise is becoming irremediable, so that new and serious misfortunes must be expected. I have instructed our minister, at whose disposal I have placed all our forces in the Far East, and others if required, to keep himself in constant communication with his colleagues of the diplomatic corps whose accord has not ceased to be complete. At the present moment, while I am speaking, a step is being taken, or is about to be taken, by the various legations to call the attention of the Chinese Government for the last time to the imperious necessity of putting down a movement which imperils both the empire and itself, as well as the interests which the powers cannot disregard. If this appeal were to remain without effect, the powers would no longer have to take counsel with any one but themselves, and to take into account nothing but the interests of civilisation; and I imagine that if a mis-

11. It is believed that the two grounds of intervention which have been considered are alone consistent with modern practice. It is sometimes suggested that on humanitarian grounds one nation is justified in intervening to prevent practices shocking to humanity within the territory of another. The occasional benefits of such intervention would be outweighed by its liability to abuse. Abstractedly no doubt it is regrettable that international law should prohibit, even by implication, the suppression of outrage, but in practice the number of national Don Quixotes is not found to be considerable, and thinkers of very different schools are content to distinguish between the moral standards applicable respectively to individuals and communities.[1] Sir William Harcourt, in his *Letters of Historicus*, has described humanitarian intervention as a high act of national policy over and beyond law. This view is indecisive unless such acts are to be withdrawn from the purview of international law altogether, for their legal or illegal quality requires determination all the more imperatively that they have a 'high political' character. It is often stated that intervention depending upon a treaty right is permitted, but the claim is perhaps somewhat academic. If the arrangement is merely dynastic it cannot be supported, for the sovereign who has exposed his country to an intervention intended to secure his dynasty, has clearly exceeded the limits of his competence as a national agent; if, on the other hand, one country has entitled another to intervene indefinitely in its domestic

understanding were destined to arise between them, it would be as to which would be ready the first, which would assemble most rapidly the most effectual means to defend with its own cause the cause of civilisation itself.'—Letter, date June 11, from the *Standard* correspondent in Paris.

[1] Bismarck's cynical remark, that he placed the bones of a Pomeranian grenadier above all Armenia, has been often reprobated and is offensive in expression, but the general principle of which it was only a particular application is commonly acted upon by statesmen of every country, and even Mr. Bright strongly denounced the views of those who would make England the Knight-Errant of Nations.

concerns, the derogation from independence would probably not consist with the retention of international character.

Intervention in a foreign civil war has been sometimes declared legal, but the case hardly requires separate consideration. If undertaken at the invitation of both parties, it is mediation by request and therefore unobjectionable; if at the invitation of one, Mr. Hall's observation is unanswerable: '. . . The fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.'

CHAPTER II

Proprietary and Quasi-Proprietary Rights and Duties

1. The rights and duties of nations considered as proprietors may be arranged under three heads:—

1. Rights over land.
2. Rights over water.
3. Rights over miscellaneous objects.

1. Rights over Land

A state may exercise control over land in a variety of degrees, directly as an integral part of its dominions, or indirectly as over a protectorate or sphere of influence. In the two cases last mentioned it is a question of fact in each case whether the rights claimed are proprietary at all in their character. A state may acquire territory in a variety of ways of which four are sufficiently important to be mentioned here. These are *Occupation*, *Cession*, *Conquest*, and *Prescription*.

Occupation is a good root of title to territories altogether unoccupied or inhabited by savages, who, by a humorous fiction, are considered incapable of possessing territory.[1]

[1] It is better, I think, to state this proposition boldly than like Phillimore to accept the argument, 'The North American Indians would have been entitled to have excluded the British fur-traders from their hunting-grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations.'

The rules of occupation were borrowed wholesale from the very sensible provisions of Roman private law. Discovery of new territory by a private individual was generally held to confer a good title on the state to which he belonged. For a time the rule was not practically inconvenient, but the discovery of the New World subjected the doctrine to a strain which it was wholly unable to support. The rule which originally determined the right to a derelict article in the streets of Rome was applied to the vast territories which each year's maritime adventure was disclosing to the nations of the world. The pretensions of Spain and Portugal produced a reaction until in our days 'prior discovery, though still held in considerable respect, is not universally held to give an exclusive title.'[1] Unless followed up by settlement, 'discovery is only so far useful that it gives additional value to acts in themselves doubtful or inadequate.'[2] Private individuals, bearing no commission from their government, are not capable of legal occupation; but acts of control done by such persons, if ratified afterwards by their governments, may be retrospectively validated. The underlying principle is that occupation to be valid must be reasonably effective, having regard to the circumstances of the particular case. Formal annexation, without more, is not therefore a root of title, though the fact of such previous occupation may lend a different colour to later acts which, if they stood alone, would be indifferent or indecisive. These conclusions have been stated with great common sense by Mr. Hall:[3]—

'It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as allowing for

[1] Maine, *International Law*, p. 66.
[2] Hall, ed. 2, p. 108.
[3] *U. S.*, pp. 108, 109.

accidental circumstances, or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title.'

2. It is clearly important to define the area over which a geographically partial act of occupation may be allowed to extend. In the early days of American colonisation extravagant pretensions were put forward by both England and France, and the view was probably held in this country that occupation of the coast carried with it the whole continent to the Pacific Ocean.[1] A more reasonable rule is now generally adopted that occupation of a coast shall comprehend the interior as far as the watershed of the river flowing into the sea at the point of occupation: laterally such occupation embraces the tributaries of such rivers, and the territory covered by them.[2] It may be supposed that the area within which the doctrines above stated can be practically applied is rapidly lessening, although in recent times the opening up of the African continent has brought them into prominence. The future lines of African colonisation have now been generally determined by agreement, but useful illustrations of the principles of occupation may still be drawn from the Oregon territory dispute between this country and the United States in 1844,[3] and the Louisiana dispute between the latter country and Spain in 1803.[4]

3. Occupation can only come into play when there is a

[1] There was no limit specified in the English colonial grants, and the early settlers seem to have met French aggression with indefinite claims to the interior.

[2] This principle was stated at the Louisiana negotiation in 1804. See Twiss, *Law of Nations*, i. pp. 125, 126.

[3] *Parl. Papers*, iii., 1846, Oregon Correspondence. Twiss, *Oregon Question*, c. iv.

[4] *British and Foreign State Papers*, 1817-1818.

res nullius to be occupied, but the requirement is of course satisfied when territories previously occupied by a civilised country are definitively relinquished. In the Santa Lucia negotiation between this country and France in 1763, it was admitted that abandonment for ten years may be treated as definitive. The Delagoa Bay dispute between this country and Portugal in 1875 established the principle that, when the power to control is never lost, occasional acts of sovereignty are sufficient to keep alive a title by occupation. The question of African colonisation was considered at the Berlin Conference in 1885, and an agreement arrived at by all the great powers, including the United States, which is likely to avert misunderstandings in the future. The signatory powers bound themselves to acquire no land and assume no protectorates on the coast of Africa without notifying one another of their intentions. It is possible that the convenience of the practice may procure its reception in regions other than the African coasts.

4. **Prescription.**—The acquisition of territory by cession and conquest needs no detailed notice, but the place of prescription in international law may be shortly considered. The old Roman plea for prescription *ne dominia verum diutius in incerto essent* applies in the abstract with equal force to international law, and the majority of writers are agreed that international rights may be acquired and lost by lapse of time. The doubts, however, suggested by De Martens[1] and Kluber[2] cannot be dismissed as entirely fanciful. In municipal systems the prescriptive acquisition of rights is ordinarily regulated by the maxim, *Fraus omnia vitiat*, and so guarded, the limitation which ownership undergoes for its own protection does not come into conflict with the general conscience. In international law such a reservation has no place, and a fraudulent root of title is as good as another where time has consecrated the original offence. It

[1] *Précis*, § 70-1.
[2] *Le droit des gens moderne de l'Europe*, § 6.

may be gravely doubted, however, whether in practice nations will submit to rules which bear hardly on their material interests and which are easily evaded by reason of their vagueness. The difficulty is increased by the failure of international law to supply positively a generally applicable period of prescription. 'The provision that rights may be acquired by enjoyment for a period 'whereof the memory of man runneth not to the contrary,' implicitly requires that it shall be determined how deep are the roots that bind human memory to the past. To say 'rights may be prescriptively acquired, the precise period of prescription is uncertain,' is merely to recommend academically acquiescence in the *status quo*. Here as elsewhere the test is practical, and it would be interesting to learn what period of limitation the more precise of the text writers would assign to the French aspirations towards Alsace-Lorraine. It is surmised that considerations of time would weigh lightly with French politicians if German embarrassments afforded an opportunity, nor is it believed that contemporary opinion would judge such an attitude harshly. It is, however, useful to observe that in some degree every civilised nation must ultimately fall back upon a prescriptive root of title. The recognition of the debt is often obscurely made, yet to its influence may be traced that instinctive reverence for 'accomplished facts,' which, as a force making for tranquillity, is of incalculable international importance.

5. The nature of the rights involved in international ownership, or the *dominium eminens* of the state, is of course of a somewhat peculiar character, but as between two distinct communities, ownership may be described well enough in Austin's well-known words: 'The right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration.' Such a right, though difficult to define positively, is familiar and intelligible enough in its general features. Greater difficulties beset the attempt to determine exactly the legal position where the claims are less exclusive: it is at this

point that serious problems, already noticed from a slightly different point of view, are raised by the extensions of territory variously described as protectorates, spheres of influence, chartered company territory, and leasehold territory. It has been suggested already that a protected state controlled internally and externally by the protecting power has in fact become a part of its dominions, differing from the rest merely in the possession of a more likely prospect of future emancipation. A sphere of influence is the phrase vaguely used to describe an area which the power enjoying it wishes to possess but is not prepared immediately to occupy. To proclaim a sphere of influence is in fact to say 'hands off' to possible competitors. No powerful state would allow foreign interference within the area of a sphere of influence, and the attempt to interfere would probably be treated as a *casus belli*: under these circumstances it is both convenient and accurate to include such spheres among the territorial belongings of a state. The latest concession to international sensitiveness is to be found in the 'leasehold interests' which the delicacy of continental diplomacy has introduced in the far East. The political advantage of such 'leases' is to be found in the easy graduation of the assimilative process, but their legal importance is not considerable. At a given moment authority and jurisdiction are resident either with the power which grants, or with that which receives, the lease. In the first case concessions of unusual scope and vagueness, but fully consistent with a continuance of the prior ownership, have been conventionally made; in the second there has been an actual transfer of territory from one power to the other. A rough but usually sufficient test is the incidence of responsibility to foreign powers. If a European country obtains a 'lease' from China, fortifies its acquisition, and undertakes responsibility within its limits, no devices of nomenclature can disguise the charge which has been covertly effected.

2. Rights over Water

6. The Ocean.—For many centuries the ocean was generally admitted to be a possible subject of national appropriation. The character of the pretensions put forward was well stated by Cockburn, C. J., in The Queen *v.* Keyn:[1]—

'. . . From an early period the kings of England, possessing more ships than their opposite neighbours, and being thence able to sweep the channel, asserted the right of sovereignty over the narrow seas, as appears from the commissions issued in the fourteenth century, of which examples are given in the Fourth Institute, in the chapter in the Court of Admiralty, and others are to be found in Selden's *Mare Clausum*, Book 2. At a later period still more extravagant pretensions were advanced. Selden does not scruple to assert the sovereignty of the King of England over the sea as far as the shores of Norway, in which he is upheld by Lord Hale in his treatise, 'De jure maris,' Hargrave's *Law Tracts*, p. 10.

'In the reign of Charles II. Sir Leoline Jenkins, then the Judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty Sessions at the Old Bailey, not only asserted the King's sovereignty within the four seas, and that it was his right and province "to keep the public peace on these seas"—that is, as Sir Leoline expounds it, "to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions," but extended this authority and jurisdiction of the king:—

'"To preserve the public peace and to maintain the freedom and security of navigation all the world over, so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the king be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such country, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the Laws given to his vice-regent the King."

[1] 2 Exchequer Division, pp. 174-5.

'To be sure, this learned civilian, as regards these distant seas, admits that other sovereigns have a concurrent jurisdiction, which, however, he by no means concedes to them in these so-called British seas. In these the refusal by a foreign ship to strike the flag and lower the topsail to a king's ship he treats as amounting to piracy.

'Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea. The Portuguese claimed to bar the ocean route to India and the Indian seas to the rest of the world, while Spain made the like assertion with reference to the West.'

7. The claim was sometimes pushed to practical consequences. Thus, in 1636, England compelled the Dutch to pay £30,000 for the privilege of fishing in the German Ocean, and more than one war between England and Holland sprang from the Dutch refusal to lower their flag in recognition of the maritime sovereignty of the former country. Until 1805 British naval officers were instructed by the Admiralty regulation to compel foreign ships to 'strike their topsail and take in their flag' within the king's seas, which were declared to extend to Cape Finisterre. But, as Cockburn, C. J., expressed it, 'these vain and extravagant pretensions have long since given way to the influence of reason and common sense,'[1] and the American attempt to revive them at one stage of the Alaska Territory dispute was not seriously pressed. The American claims to an extent of water 1500 miles by 700 were, ironically enough, derived from a Russian ukase, the revocation of

[1] *U.S.*, p. 175. As lately, however, as 1837 Captain Furneaux, R.N., in his *History of Treaties*, observes (Preface, xiii): 'The limits of the British jurisdiction on the seas extend generally from Cape Stadelard in Norway to Cape Finisterre. . . . In having permitted a silence in most of her treaties at the termination of the late war . . . on the question of nations navigating unconditionally in the British seas, England has evinced a spirit of moderation, and proved that she does not contend for a vexatious exercise of power. The writer judiciously adds: 'It is to be hoped the blessings of peace may long permit us to regard these questions as of no vital importance to the interests of Great Britain.'

which the United States had been instrumental in procuring. The arbitration tribunal, which gave its decision in 1893, made short work of the attempt to extend the territorial jurisdiction of Alaska. *Nemo dat quod non habet*, and the Emperor Alexander I. could not pass on to the United States jurisdiction which he himself had illegally assumed. It may now be stated quite generally that the sea lies open to the unimpeded navigation of all, but that an exclusive jurisdiction may be asserted by each country over that portion of it which is closely adjacent to its own territory. The precise extent of the area covered by this qualification was not unnaturally a source of contention among the earlier jurists.[1] Albericus Gentilis allowed one hundred miles from shore, Valin as far as the lead line could find bottom, while Baldus and Bodin were content with sixty miles. The true principle already indicated by Grotius was clearly stated by Bynkershoek, 'Potestatem terræ finiri ubi finitur armorum vis.'[2] Control over the sea, he elsewhere says, extends 'quousque tormenta exploduntur.'[3] The same writer proposed the three-mile limit which has since been generally adopted. It is, however, material to notice that the limit was appointed in reliance upon data which are no longer applicable; *cessante legis ratione cessat et ipsa lex*, and it seems reasonable to extend the area of control coincidently with the increasing range of artillery. Thus the *Traité des Prisés Maritimes*, published in 1855, lays it down that the *portée du canon* is the proper limit of territorial waters.

8. **The King's Chambers.**—A somewhat more extensive claim is doubtfully allowed 'in respect to those portions of the sea which form the ports, harbours, bays and mouths of rivers of any state where the tide ebbs and flows';[4] thus

[1] Massé very sensibly observes: 'C'est du reste, un point fort difficile à décider en théorie pure, que celui de savoir quelle est l'étendue de la mer littorale.'

[2] Land control ends with the range of weapons.

[3] As far as the range of offensive weapons. [4] Wheaton, § 188, 1.

under the name of the King's Chambers it is believed that this country claims jurisdiction over the water enclosed between straight lines drawn from headland to headland. A similar claim, but one proportionately more imposing, is put forward by Chancellor Kent[1] on behalf of the United States:—

'Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes.'

With this view, however, may be compared the opinion expressed by an American Secretary of State in 1875, in a despatch to this country:—

'We have always understood and asserted that pursuant to public law no nation can rightfully claim jurisdiction beyond a marine league from its coast.'

9. **Rivers.**—In considering ownership over rivers, a difficulty has been sometimes felt, or affected, in dealing with those whose waters flow over the territory of more than one country. The riparian inhabitants of a stream which disembogues itself into the sea in foreign territory are deeply concerned to maintain an open passage; and this interest combining with a general perception that wantonly to deny such passage was an unfriendly act, has introduced some confusion into the law. Grotius himself and many of his most eminent successors failed to distinguish between the obligations of comity and of law. Vattel recognises a right,

[1] Ed. 1844, *Commentaries*, vol. i. p. 29.

but calls it 'imperfect'; a not very happy way of saying that in his opinion, free river transit should be enforceable from all nations, but in fact is not. The *jus innoxii transitus*[1] has been several times alleged by American diplomatists. In 1783, in a dispute with Spain over the closing of the Mississippi, the freedom of rivers to 'riparian inhabitants was declared to be a sentiment written in deep character in the heart of man,' a reference to authority which recalls the older appeals to the law of nature. In the St. Lawrence dispute between the United States and this country in 1824, the same claims were supported by similar arguments. 'The right of the upper inhabitants to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element.'[2] These somewhat rhetorical statements are hardly supported by either theory or practice; on the face of it the claim is exceptional, and an undischarged onus rests upon those who affirm it; in practice it has not been admitted, and the right of transit has been ordinarily secured by convention. An Act of the Congress of Vienna in 1815, framed pursuantly to the Treaty of Paris in 1814, declared that the use of rivers flowing through the territories of different powers should be free to the navigation of all. In 1831 the freedom of the Scheldt, which had thus been opened, was reaffirmed by the treaty of separation between Belgium and Holland, and by the Treaty of Paris in 1856 the Danube was declared to be open to commerce. The treaty of San Lorenzo el Real in 1795 opened the Mississippi to American navigation, and the St. Lawrence controversy, already referred to, was settled in the same manner by a treaty between this country and the United States. Under this agreement the American Government purchased the freedom of the St. Lawrence by throwing open Lake Michigan to English commerce.

[1] Right of harmless transit.

[2] *British and Foreign State Papers*, 1830-31, pp. 1065-1075, *see* Hall, ed. 2, p. 139.

Rights over Miscellaneous Objects

10. Under this head must be shortly considered the rights which states possess over property which is not situate within the territory, whether or not such property is within the jurisdiction of another state. In this class fall all vessels, public and private, which are outside the territorial waters of the country whose flag they fly. Jurisdictional rights over ships will require treatment elsewhere, but it is convenient to notice in this place the general character of such vessels.

Public vessels are all vessels in the exclusive employment of the state whether such employment be permanent or occasional. The public character of the vessel must be established by such a commission to the commander as will be recognised in his own country. The production of his commission by the commanding officer is sufficient evidence of the character of his vessel, and in practice his word is usually accepted. When the United States Government protested against the reception of the *Sumter* in Curaçao Harbour, the Dutch Government attempted to evade responsibility by the contention that 'le gouverneur néerlandais devait se contenter de la parole du commandant couchée par écrit.'[1] An affirmation by a government that a particular vessel is a public ship of the state is of course conclusive. Thus in the *Parlement Belge*,[1] Brett, L. J., delivering the judgment of the court, observed :—

'The ship has been declared by the sovereign of Belgium, by the usual means, to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire, by contentious testimony, whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be

[1] Ort, *Dip. de la Mer*, i. 183 ; Hall, ed. 2, p. 168.'
[2] 5 P. D. at p. 219.

inquired into. That was expressly decided under very trying circumstances in the case of the Exchange.[1] Whether the ship is a public ship used for national purposes seems to come within the same rule.

A private ship, to make good its claim to nationality, must have conformed to the rules imposed by the state to which it claims to belong. Such rules will ordinarily deal with the flag under which it sails, or the nationality and domicile of its owners.

[1] 7 Cranch. 116.

CHAPTER III

Rights and Duties incident to Jurisdiction

THE subjects which require treatment under the head of jurisdiction are arranged in the following order :—

1. Jurisdiction within the Territory.
2. Exemptions from the above Jurisdiction.
3. Jurisdiction without the Territory.

1. JURISDICTION WITHIN THE TERRITORY

1. A state enjoys rights of jurisdiction in varying degrees over (i) its natural-born subjects, until such persons have changed their nationality in a manner recognised by its laws; (ii) naturalised subjects; (iii) aliens resident in, or passing through, its territory.

2. **Natural-Born Subjects.**—Normally, of course, a child is born in the country to which his parents belong, and no question can arise as to its nationality. Where, however, it is born in a country in which its parents are aliens, two different views are possible. According to the first, which was at one time almost universally held, territorial considerations were paramount, and the child's nationality was determined by the place of its birth; according to the second the decisive criterion was the nationality of the father, and the place of birth was treated as accidental. A rigid adherence to the earlier view would have involved the conclusion that a child born in France of an English mother on her way to Switzerland was a French subject, while the later would have made it possible to impress as British

subjects naturalised American citizens of English extraction to the third or fourth generation. Both the territorial principle, and that which depended upon parentage, were, in fact, incapable of extreme logical application. It is not surprising to find that under these circumstances national practice varied. By the English common law all persons born on English soil were British subjects, and statutory additions thereto declared the children and paternal grandchildren of natural-born subjects[1] to be themselves British subjects wherever born. And such nationality could not be affected by naturalisation elsewhere. In the language of Blackstone:—

'It is a principle of universal law that the natural-born subject of one prince cannot by any act of his own—no not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits and difficulties of owing service to two masters: and it is unreasonable that by such voluntary act of his own he should be able at pleasure to unloose those bands by which he is connected to his natural prince.'[2]

Statute law has made great inroads upon this doctrine, but it still represents the general rule in England. The American view was similar, though an Act of Congress passed in 1855 declared that the children of American fathers born abroad should themselves be American subjects. Austria, Germany, Denmark, Greece, Norway, Sweden, and Switzerland determine national character by reference to the father's nationality. Russian practice appears to be similar, with the addition that all persons born and bred on

[1] *Cf.* 7 Anne, c. 5, 4 George II., c. 21, 13 George III., c. 21.

[2] *Commentaries*, vol. i. p. 369, *cf.* also the judgment delivered by Coleridge, C. J., in Isaacson *v.* Durant, L. R. 17, Q. B. D. 58.

Russian soil are treated as Russian subjects whatever their parentage. In France, as Mr. Hall expresses it,[1] 'the law has been so modified by recent enactment[2] that its only apparent principle seems to be supplied by a desire to ascribe French national character to as large a number of persons as possible.' Pursuantly to this object it 'is provided that every child (including those of foreign parentage) born in France is to be deemed a French citizen unless he has made a declaration of alienage in the year following the attainment of his majority. The children of French parents born abroad are French citizens unless naturalised elsewhere. Most states now provide that the children of aliens born in their territories may retain their nationality by making a declaration of alienage on or after attaining majority, a provision which meets the most serious inconveniences of the territorial theory. The opinion, however, which bases allegiance upon parentage, especially when combined with the view cited from Blackstone that the individual cannot at will dissolve his national ties, may still give rise to controversy. Although the practice is becoming general for each state to prescribe the conditions under which its own citizens are at liberty to change their nationality, circumstances are still conceivable under which the same person may owe allegiance to more than one state according to the laws of each. The war between this country and the United States in 1812 sprang from the English attempt to impress Englishmen naturalised in the United States. Claims similar in character, though not in extent, were put forward till late in this century, when the English law was changed by the Naturalisation Act of 1870. The conflict was between those who affirm a 'right of expatriation,' and those who maintained with Blackstone the doctrine of indissoluble allegiance: *nemo potest exuere patriam.*[3]

[1] Ed. 2, p. 236.
[2] The laws of June 26, 1889, and July 28, 1893.
[3] No man can divest himself of his nationality.

American statesmen have at different times taken different views. On at least one occasion the doctrine of inalienable allegiance has been affirmed by the Supreme Court, but in 1868 an Act of Congress declared that 'the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.' This resolution is hardly consistent with the most authoritative practice. Many states recognise the claims of the *patria originis* by the refusal to naturalise except where the consent of that country has been given: it is moreover the general practice among European nations to impose conditions on the act of expatriation, a practice not to be reconciled with the existence of the absolute right alleged.[1] Finally a study of recent controversies suggests that expatriation made without permission would not be held in any country to protect a person naturalised elsewhere from the consequence of obligations incurred previously to naturalisation. If these considerations are well founded, each state has the right of determining the conditions under which its citizens shall be at liberty to leave it. Occasions of controversy are not likely to occur in future, unless the person naturalised has failed to comply with these conditions, and in such a case the country of adoption is not entitled to intervene between its new subject and his country of origin.

3. **Naturalised Subjects.**—The naturalisation laws of each state naturally vary in details, and particularly in the length of previous residence required. In a work of this scope it is not possible to give an account of the rules which obtain in foreign systems, but a short statement of the effect of the English Naturalisation Act 1870[2] may usefully be added.

Sections 2, 3 deal with the status of aliens. Section 4 is as follows:—

'Any person who by reason of his having been born within

[1] Hall, ed. 2, p. 245.

[2] 33 Vict. c. 14.

the dominions of her Majesty is a natural-born subject, but who also, at the time of his birth, became under the law of any foreign state a subject of such state, and is still such subject may, if of full age and not under any disability, make a declaration of alienage . . . and such person shall cease to be a British subject. Any person born, out of her Majesty's dominion, of a father being a British subject may . . . make a declaration of alienage and . . . shall cease to be a British subject.'

Section 6 provides that any British subject who has become, or shall become, naturalised in a foreign state while resident there, shall cease to be a British citizen and become an alien. Section 7 provides that an alien who has resided in the United Kingdom for a term of five years, or has been in the service of the crown for a like period, and purposes to continue such residence or service, may apply to a Secretary of State for a certificate of naturalisation. Section 8 contains provisions for the readmission to citizenship of 'statutory aliens,' or persons who have abandoned their nationality pursuantly to the Act, and for the purposes of this section, residence in any British possession will be equivalent to residence in the United Kingdom. Section 10 deals with the national status of married women and children. A married woman is deemed to be a subject of the state of which her husband is, for the time being, a subject. A widow, being a natural-born British subject who has become an alien through marriage, is treated as a 'statutory alien,' and may be readmitted to citizenship accordingly. The effect of section 15 is that the loss of British nationality does not discharge from liability for previous acts or defaults. Section 16 enables the legislation of any British possession to pass laws 'for imparting to any person the privileges, or any of the privileges, of naturalisation to be enjoyed by such person within the limits of such possession.'

4. **Aliens domiciled in or passing through the Territory.**—The legal effects of domicil assume importance in connection with the rules of war. It is sufficient here to notice that the nature of the jurisdiction which may be

asserted over persons domiciled in a foreign country by the government of that country differs only in degree, and not in character, from that which is exerciseable over aliens passing through the territory. Both alike are *subditi temporarii*, and are amenable to the criminal jurisdiction for acts committed within its area. They are not liable to military service, and on principle this immunity ought not to be affected, in the case of domiciled persons, by an expression of intention to become citizens of the state in which they reside. It seems, however, to have been admitted in the negotiations between this country and the United States in 1863 that resident foreigners who had made known such an intention might be subjected to the obligation of military service as an alternative to leaving the country within a reasonable period. No right to protection, as against the country of allegiance, or indeed as against third powers, can be based upon a residence which falls short of naturalisation; and the American claim in the case of Martin Koszta, that a domiciled foreigner, who had made a statutory declaration of intention to become a citizen of the United States, was entitled to the same protection as a fully naturalised person, was consistent neither with principle nor with authority.

2. Exemptions from the above Jurisdiction

4. International comity and convenience have given rise to several exemptions from the jurisdictional rights above described. Thus a foreign sovereign and his suite are not amenable to the jurisdiction of a state in the territory of which they may happen to be. As Lord Langdale expressed it in Duke of Brunswick *v.* King of Hanover[1]: 'There are reasons for the immunities of sovereign princes at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors.' So Vattel[2]: 'S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert

[1] 6 Beav. at p. 50.

[2] Lib. iv. c. 7, 8, 108.

de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute juridiction.'[1] The immunities of diplomatic agents have been already considered, and by way of final exception may be mentioned the privileges conceded by the practice of nations to armed forces and public vessels of foreign powers while within the state territory. Occasions for the earlier concession are naturally rare, but the freedom from jurisdiction has been repeatedly affirmed; in the case of public vessels, practice has varied greatly though the law is now well settled in favour of the immunity. The luminous judgment of Marshall, C. J., in the American case, The Exchange *v.* M'Fadden,[2] had much to do with the consolidation of the doctrine:—

'[A public armed ship] constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign: is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity. The implied licence therefore under which such vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality. . . . Certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.'[3]

Jurisdiction without the Territory

5. This jurisdiction may be conveniently considered under the following heads:—

i. Jurisdiction over subjects in foreign countries.
ii. Jurisdiction over public ships wherever situate.
iii. Jurisdiction over private ships on the high seas.
iv. Jurisdiction over pirates.

[1] Cited at p. 206 of the judgment in the Parlement Belge, 5 P.D.
[2] 7 Cranch. 478.
[3] *l.c.*, at p. 487.

1. *Jurisdiction over Subjects in Foreign Countries*

6. The jurisdiction over subjects resident in Eastern countries has been already described, and depends entirely upon convention. Jurisdiction is also claimed by most states over offences against their municipal laws committed by their subjects in foreign countries. By the English common law and by American law crime was, as it is technically expressed, 'local,' *i.e.* justiciable only when committed, but a long succession of English and American statutes has added to the list of offences committed abroad for which criminals of these countries may be called to account by the courts of their own countries. Treason,[1] murder,[2] homicide, and bigamy[3] are the principal offences which have been so dealt with in England. It need hardly be said that the jurisdiction can only be made effective if the offender re-enters the country of his allegiance.

Connected with the subject now under discussion is that of extradition, or the recovery for justice of criminals who have fled to a foreign country to escape from the consequences of their crimes. It is impossible to allege, as so many jurists have done, that there exists, apart from treaty, a common law right to demand the extradition of criminals. Had such a right existed, there would have been no occasion for the great number of treaties by which it has been expressly secured.[4] As Lord Brougham said in the House of Lords in 1842 when the Creole case was under discussion: 'What right existed, under the municipal law of this country, to seize and deliver up criminals taking refuge there? What right had the government to detain, still less to deliver them up? Whatever right one nation had against another nation—even by treaty which would give the strongest right—there was by the municipal law

[1] 25 Edw. 3. st. 5, c. 2. [2] 24 and 25 Vict. c. 100, § 9.
[3] 24 and 25 Vict. c. 100, § 57.
[4] Heffter, *Europäische Volkerrecht*, § 63.

of the nation no power to execute the obligation of the treaty.'[1]

A full account of extradition practice would far exceed the scope of this work, but the English rules may be briefly stated, to illustrate the principles involved. The right to deliver up criminals, or recover them, as the case may be, depends municipally upon three statutes.[2] Internationally it is secured by about forty treaties with different foreign powers, comprehending almost all the graver offences. The first condition precedent to extradition is a requisition from the diplomatic representative of the state seeking it. This is addressed to the Secretary of State, whose duty it is to determine whether the crime in question is of a political nature. § 3 (1) of the Act of 1870 provides that 'a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character.' The meaning of this qualification was much discussed *in re* Castioni.[3] Denman, J.,[4] observed: 'The question is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part.' Hawkins, J.,[5] cited with approval the observations contained in Stephen's *History of the Criminal Law*:[6] 'I think therefore that the expression in the Extradition Act ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.' If the character of the crime is not political, the Secretary of State addresses an order to a magistrate for the issue of a warrant to apprehend the person

[1] Forsyth Cases and Opinions in Constitutional Law, *cf.* Kent's *Commentaries*, §§ 39-42. Edit. 8.

[2] 33 and 34 Vict. c. 52, 36 and 37 Vict. c. 60, 58 and 59 Vict. c. 33.

[3] [1891] 1 Q.B. 149.

[4] *l.c.*, at p. 159.

[5] *l.c.*, p. 165.

[6] Vol. ii. pp. 70, 71.

accused. Notice must be sent to the Secretary of State of such issue. After issue the alleged criminal cannot be surrendered for a period of fifteen days at least, during which time the Secretary of State may discharge the person apprehended after cancelling the warrant.

II. *Jurisdiction over Public Ships*

8. The so-called theory of territoriality holds that ships are, so to speak, detached fragments of the country to which they belong, carrying with them its privileges, and therefore immune from alien jurisdiction. This view, so far as it is applied to public ships, gives a fair idea of the immunities which they enjoy. Any interference with them is an act of war, and satisfaction for wrongdoing must be obtained from the government by which they are commissioned.

III. *Jurisdiction over Merchant Ships*

9. Every state possesses jurisdiction over its merchant vessels and their crews while upon the high seas. Here the facts fall far short of the fiction of territoriality, for the jurisdiction of origin gives way in case of conflict as soon as the vessel arrives within the territorial waters of another state. If, however, the local jurisdiction is not asserted, the state to which the vessel belongs may properly exercise its concurrent jurisdiction. The earliest statutes in this country on the subject of Admiralty jurisdiction are 3 Rich. II. c. 3, and 15 Hen. VIII. c. 15, and the English view was well expressed by Bovill, C. J., in the Queen *v.* Anderson:[1]—

'When our vessels go into foreign countries, we have the right, even if we are not bound, to make such laws as to prevent disturbances in foreign ports, and it is the right of every nation which sends ships to foreign countries to make such laws and

[1] L.R. 1 C.C.R. 166.

regulations. . . . The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows, and where great ships lie and hover. What difference is there between such a place and the high seas? The cases clearly show that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas.'

IV. *Jurisdiction over Pirates*

10. Sir Charles Hedges, Judge of the High Court of Admiralty, in his charge to the grand jury in Nix *v.* Dawson[1] gave the following definition of piracy. 'Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy.' This definition, which has been cited with approval in the Privy Council, was made with particular reference to the law of England, and it must be carefully noticed that the municipal policy of a particular state may treat as piratical acts which do not bear that complexion by the law of nations. Piracy in international law is defined as the offence of depredating on the seas[2] without being authorised by any responsible state, or with commissions from different sovereigns at war with each other.[3] Pirates are *hostes humani generis*, and are justiciable, as Sir L. Jenkins puts it, 'being reputed out of the protection of all laws and privileges . . . in what ports soever they may be taken.'[4] It is of the essence of piracy that the acts complained of are done without the authority of a sovereign

[1] 13 St. Tr. 654.

[2] Bynkershoek adds 'or land' (*Quæst. Jur. Pub.* lib. i. c. xvii.). The extension is reasonable when the acts are performed by persons descending on the land from the sea.

[3] Boyds Wheaton, third English edition, p. 193.

[4] *Works*, vol. ii. p. 714, cited Wheaton.

state. As the same authority has it[1]: 'The law distinguishes between a pirate who is a highwayman and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man of war that exceeds his commission.' The definition given above makes it impossible to treat as pirates the bearers of marque. A tendency has been shown from time to time to extend the definition so as to comprehend such persons, but however objectionable the practice of issuing privateer commissions to foreigners may be, the bearers are clearly not pirates, insomuch as they have behind them a politically organised and responsible society.

The doctrine above set forth was much discussed in the case of the *Huascar*. In 1877, in the course of a revolution at Peru, the crew of the *Huascar* seized the vessel and committed acts of violence on some British steamers. The Peruvian Government by decree repudiated all responsibility for the acts of the ship. Under these circumstances the English commander in the Pacific, regarding the acts of the *Huascar* as piratical, engaged her in an indecisive encounter. The Peruvian Government then made a demand for satisfaction on the untenable ground that the acts of the *Huascar* did not amount to piracy. Piratical in the vulgar sense they certainly were not, but they were most clearly so within the meaning of international law. So far from there being a responsible, there was not even a belligerent society behind the vessel. She stood completely alone.[2]

[1] *Works*, vol. ii. p. 714, cited Wheaton.
[2] *Parl. Papers*, Peru, No. 1, 1877.

CHAPTER IV

The Treaty Law of Nations

1. TREATIES form the contract law of states, and it is in dealing with their enforcement and duration that international law most conspicuously fails.[1] The right to make treaties is an inherent element in national independence, and is, perhaps, the most decisive test of the existence of sovereignty. It is immaterial to the legal view where the treaty-making power resides, and other nations are only entitled to demand from those with whom they contract a *de facto* ability to bind the society which they assume to represent. No very valuable classification of treaties can, from the nature of the case, be given, for such instruments range over the whole variety of international relations. A broad distinction is drawn, however, and will be discussed later, between such as produce their effect once for all, and are then, so to speak, exhausted, *e.g.* a treaty of cession, and such as purport to regulate the relations of the contracting parties for an indefinite period. The former are usually described as transitory conventions. The so-called treaties of guarantee are

[1] Thus Mr. Woolsey (ed. 5, p. 170), who certainly does not underrate the influence of international law, observes: 'A combination to commit injustice, . . . for example, to conquer and appropriate an independent country, as Poland, is a crime which no formalities of treaty can sanction. This rule, it is true, is not one of much practical application to the concerns of nations, for, beforehand, most of the iniquities of nations are varnished over by some justifying plea, and the only tribunal in the case is the moral indignation of mankind, while after the crime has triumphed, mankind accepts the new order of things rather than have a state of perpetual war.'

sometimes difficult to construe, especially when the guarantee is jointly made by several powers. Under this head acts in themselves illegal have sometimes been defended by a supposed treaty right; in judging the legal quality of such acts it must never be forgotten that a treaty between A and B can under no circumstances entitle either as against C to do acts which are not otherwise permissible. So far as C is concerned the treaty is *res inter alios acta*. The treaty by which the great powers asserted the perpetual neutrality of Belgium in 1831 is a well-known instance of a collective guarantee. It has been much disputed whether, if the other parties to such a guarantee decline to intervene on occasion, a single signatory is released from his obligations. Lord Derby answered this question affirmatively in a controversy which arose as to the English obligations under the Treaty of Luxemburg in 1867: 'In the event of a violation of neutrality all the powers who have signed the treaty may be called upon for collective action. No one of these powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability.'[1] Mr. Hall[2] criticises this view on the ground that 'a guarantee is meaningless if it does no more than provide for common action under circumstances in which the guaranteeing powers would act together apart from treaty, or for a right of single action as a matter of policy.' It seems a sufficient answer to the objection that states may normally be expected to abide by their undertakings, and therefore a joint guarantee will ordinarily secure concerted action pursuantly to its terms, though the circumstances are no longer such that 'the guaranteeing powers would act together apart from treaty.' On principle Lord Derby's contention is unanswerable. If a state undertakes a duty in concert with others, on what principle is it committed to an isolated performance? It was never pledged to such action, and its unassisted resources may fall far short of the occasion.

[1] Hansard, third Ser. clxxxvii. 1922, cited by Hall.
[2] Ed. 2, p. 361.

2. Forms and Ratification.—No form has been prescribed as essential to the validity of treaties, though, for reasons which need not be set forth, it is the practice to embody them in formal instruments. They are usually signed by plenipotentiaries of the powers interested, but are in no case binding until they have been ratified. The rule was settled in this form as early as Bynkershoek,[1] with the single exception that in his view ratification was unnecessary when the patent of authority contained full and detailed instructions. Later authorities recognise no exception at all to the rule. It is less easy to say under what circumstances ratification may properly be refused by the powers represented. Wheaton[2] recognises the following cases:—

i. Where the representative has exceeded or deviated from his instructions.
ii. Where events occurring between signature and ratification have made it impossible to fulfil the treaty stipulations.
iii. Where the parties have been labouring under a mutual error, which error is discovered before ratification.
iv. Where the circumstances have changed upon which the treaty in terms is made to depend.

The later view seems to be even more indulgent. In many countries the treaty-making body of the state is distinct from the executive, and in such cases the fullest right of withholding ratification exists. It may be doubted whether the tendency is not drifting towards the recognition of an absolute right of refusing to ratify. The view of Grotius,[3] which has reappeared so often in the pages of his successors, was coloured by the misleading analogy of agency in municipal law. It follows from the immensity of the interests involved, and the infinitely complex personality of the parties, that the negotiations between plenipotentiaries

[1] *Quæst. Jur. Pub.*, lib. ii. c. vii.
[2] 3rd English edit., p. 364.
[3] *De Jur. Bel. ac. Pac.*, lib. ii. c. 15.

are more nearly akin to the *pourparlers* of a contract than to its formation.

3. **Interpretation of Treaties.**—The text-books contain minute rules of construction for the interpretation of ambiguous passages. The value and authority of such statements is inconsiderable. Treaties are to be interpreted like other documents upon broad principles of common sense. and refined rules of construction are of little importance when no authoritative tribunal can enforce them. The common-sense view was well stated by Erle, C. J., in an English case:[1] 'We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words, and from the context, the true intent and meaning of the contracting parties whether they are A and B, or happen to be two independent states.'

4. **Commencement and Termination of Treaty Obligations.**—As soon as ratification of a treaty has taken place, its obligatory effect is carried retrospectively to the time of signature. As Mr. Justice Davis in an American decision[2] expressed it: 'It is undoubtedly true, as a principle of international law, that as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect confirming the treaty from its date.'

Greater difficulties present themselves in determining the period when treaty obligations cease to bind, and it is somewhat unfortunate that the most authoritative statement on this point cannot be confidently accepted. The following proposition was affirmed at the Declaration of London in 1870:—'The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey, assembled to-day[3] in conference, recognise that it

[1] Maryat *v.* Wilson, 1 Bos. and Pull. at p. 439.
[2] Haver *v.* Yaker, 9 Wallace, at p. 34.
[3] November 22, 1870.

is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers, by means of an amicable arrangement.' It may be gravely doubted whether a standard so inelastic does not involve an impossible strain on the respect conceded to international law. No temporal limits of any kind are assigned by the declaration to the duration of treaty obligations, and the refusal of one party to release another may in theory perpetuate an obligation which had its origin in wholly different conditions. Wheaton[1] treats the declaration as elementary, and observes: 'It is melancholy to think that the most civilised powers of the world should have considered it necessary to put forward such a declaration in the year 1871.' This view seems to rest on a confusion between the moral and legal aspects of the case. Carefully observing this distinction we may lay down the following propositions:—

1. No independent government can indefinitely and for all time bind its successors by treaty, for the community so shackled would no longer be completely independent. It should follow therefore that every state becomes legally entitled to repudiate a treaty of indefinite obligation as soon as the conditions which preceded its formation have undergone substantial modification.[2]

[1] Third English edition, p. 106.

[2] It is no objection to this view that the other contracting party is entitled to go to war to enforce his treaty right. It is a conspicuous weakness of international law that A may be entitled in law to declare war against B for acts which B is entitled in law to do. For instance, if a given community is forcibly annexed, it is clearly, and at any time, entitled to attempt to reconquer its independence. The power annexing is equally entitled to make good its annexation by force.

The rule in the text may be, as Mr. Hall objects, dangerously lax, but it is believed to correspond with the facts of national practice. At least it avoids the *reductio ad absurdum* to which the Declaration of London leads. If that declaration is well-founded, why are treaties of indefinite duration so often confirmed and renewed?

2. If the obligation is temporary and definite, or if the circumstances under which it was made are not materially changed, the breach of it is legally wrongful.

5. **Effects of War upon Treaty Obligations.**—It is here that the distinction already adverted to between 'transitory conventions' or treaties which produce their consequences once for all, and treaties which leave outstanding obligations, assumes importance. It is frequently laid down that 'transitory conventions are perpetual,' *i.e.* are completely unaffected by supervening incidents, including the outbreak of war.[1] In considering more equivocal cases the circumstances and scope of the particular treaty will become the determining considerations. This was the view expressed by Leach, M. R., in Sutton *v.* Sutton:[2] 'The relations which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794 . . . and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should . . . not depend upon the continuance of a state of peace.' Recent practice has distinguished between treaties in this respect, but on no very intelligible principle, providing on the conclusion of peace that certain treaties shall revive, and apparently assuming the survival of others.[3]

[1] Wheaton, *El.*, part iii. c. ii. §§ 9, 10.

[2] 1 Russ and Mylne, 675.

[3] The Treaty of Frankfort in 1871 between Germany and France expressly revived treaties dealing with copyright, extradition, commerce, navigation, and customs.

PART III

BELLIGERENCY, OR THE RIGHTS AND DUTIES OF STATES IN TIME OF WAR

CHAPTER I

Prebelligerent Acts, Commencement of War and its Effects

1. **Retorsions and Reprisals.**—The arbitrament of war is final in the disputes of nations, and the points previously in issue *transeunt in rem judicatam.*[1] There are, however, certain acts warlike in their essence but traditionally held to fall short of war, to which a nation may resort when provoked under circumstances of too little moment to call for a declaration of war. It is always open to the power affected by such acts to treat their commission as an act of war. The most familiar among them are retorsions, reprisals, and pacific blockades. Retorsion is the return in kind of acts which fall short of hostility but are marked by unfriendliness. Thus differentiation of tariff may be met by acts of retorsion on the part of the state injuriously affected. Reprisals form the appropriate reply to particular acts of wrong, which the injured party is determined to resist unless satisfaction is given. In a passage[2] which has been often quoted, Vattel says: 'Reprisals are resorted to between two states to procure justice

[1] Are merged in the decision.

[2] *Droit des gens*, liv. ii. § 342.

for themselves where it is not otherwise obtainable. If a nation has seized what belongs to another, if it refuses to pay a debt, to repair injury, or make proper satisfaction therefor, the state injured may seize something belonging to the other and use it for its own advantage till it has obtained the amount of its damage with interest, or it may retain it as a pledge until the wrongdoer has rendered full satisfaction. The property so seized is kept as long as the hope of obtaining satisfaction remains: when it disappears confiscation ensues and reprisals have accomplished their object.' Embargo or sequestration is a familiar application of the above principle. A well-known instance was supplied by the Don Pacifico incident in 1849, still remembered as the occasion of Lord Palmerston's famous *Civis Romanus sum* speech. Don Pacifico, by birth in Gibraltar, had acquired British nationality: during his residence in Athens, his house was plundered by a mob with the countenance, it appeared, of some Greek soldiers. He claimed over £21,000, and the British Government, declining the jurisdiction of the native tribunals, demanded compensation. Meeting with a refusal, they instructed the British fleet to sequestrate all Greek ships in Greek ports. The commissioners to whom the claim was finally referred reduced the claim to £150.[1] Reprisals may be defended on the ground that they form a convenient mode of procuring redress without necessarily involving war. The real character of such acts depends upon the conduct of the state at which they are directed. If it is induced to give the required satisfaction the reprisal ceases; if it refuses, 'the retroactive effect . . . impresses the direct hostile character upon the original seizure; . . . it is no longer an equivocal act.'[2]

2. **Pacific Blockades.** — The character of pacific blockades has often been confusedly stated, and practice has not always been consistent. The name itself is some-

[1] *Parl. Papers*, 1851, Wheaton, third English ed. p. 403.
[2] Per Lord Stowell in the Boedes Lust, 4 C. Rob. p. 246.

what misleading. As between the powers at issue such a blockade involves, as some forms of reprisal do, acts of constraint essentially non-pacific; but the view is now generally accepted that third powers may enter and leave the blockaded ports at pleasure. A state of war would be inconsistent with such a liberty, and from this point of view the blockade may be called pacific. The legality of this form of blockade has been repeatedly questioned, but is now well settled by the general practice of Europe. Recent instances may be found in the French blockade of Formosa in 1884, the blockade of Greece in 1886 by the Allied Fleets, and the still later blockade of Siam by France. In 1884 France attempted to exclude the ships of third powers without admitting the existence of a state of war. The reply was decisive that a state cannot at one and the same time enjoy the advantages of belligerency and retain the right of coaling at neutral ports. It is difficult to deny that pacific blockades are anomalous, but they are now well established, and have often been effective in securing their objects without bloodshed.

3. **Commencement of War.**—It has long ceased to be necessary that war should be preceded by a formal declaration, and the majority of recent wars have been commenced without one. It must, however, be remembered that the occurrence of a state of war imposes serious duties upon neutral states; belligerents are vitally concerned in the discharge of these duties, and responsibility for their exercise can only arise after due notification to neutral powers that a state of war exists. In order to give such notice, states declaring war usually publish a manifesto within their own territory giving notice of the outbreak of hostilities.

4. **Persons affected by War.**—The commencement of war produces immediate results of far-reaching consequence to the citizens of the states involved. The right to recover debts from enemy subjects is suspended during the war, and partnerships with them are immediately dissolved. Speaking generally, intercourse between the individuals of belligerent

states is only permitted under exceptional circumstances. This practice flows logically from the view that the subjects of an enemy state are themselves enemies. Certain theorists have committed themselves to the doctrine that the non-combatant individuals of belligerent communities are not affected by enemy character. Thus Rousseau, in a well-known passage, said:[1] 'La guerre n'est point une relation d'homme à homme, mais une relation d'état à état . . . chaque état ne peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport.'

It is sufficient to say of this view that it has little correspondence with the actual practice of nations. If it were well founded, acts done without question in almost every war, against both the persons and properties of civilians, would be illegal. The English view hereon was stated clearly enough by Willes, J., in Esposito *v.* Bowden:[1]—

'It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal.'

The practice of 'crippling the enemy's commerce' by capturing private property on the sea is universally admitted to be permitted by the existing law of nations, and is inconsistent with the doctrine which so many publicists have borrowed from Rousseau. The commencement of war, then, puts an end to non-hostile intercourse between subjects of the belligerent parties. It is, however, from the nature of the case impossible to carry this doctrine to an extreme conclusion, and the convenience of belligerents has provided conditions under which such intercourse becomes permissible.

[1] *Contrat social*, liv. I. ch. iv.

[1] 7 E. and B. at p. 779.

By giving a passport, a belligerent government authorises an enemy subject to travel generally in his territories. A safe-conduct is a licence, similarly given, to travel to a particular place for a particular purpose. A licence to trade is a permission by a belligerent state to its own subjects, or to enemy subjects, or both, to carry on a mutual trade notwithstanding the war in which they are engaged. Such licences are of course only effective in the courts of the issuing power, and cannot in any way affect the other belligerent. It is strictly necessary that they should emanate from the sovereign power, and, if they are issued by subordinates, the authority will be jealously scrutinised and will in no case be presumed.[1] The general principle involved in the concession of licences to trade were well laid down by Lord Ellenborough in Usparicha *v.* Noble:[2]—

'The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the crown. The crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its licence for such purpose ought to receive the most liberal construction. . . . For the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading.'

Any misdescription or misrepresentation in procuring the licence will invalidate it,[3] and there must be no unnecessary deviation from the course permitted.[4]

5. **Domicil.**—Persons other than the subjects combatant

[1] The *Hope*, 1 Dods. Ad. 226.
[2] 13 East, at p. 340.
[3] Klingender *v.* Bond, 14 East, 484.
[4] The *Emma*, Edwards 366.

and non-combatant of the belligerents, and property other than belligerent property, may, under special circumstances, become affected by enemy character upon the outbreak of war. The essence of this character lies in the capacity to subserve, directly or indirectly, belligerent purposes. A foreigner resident in a belligerent country contributes materially to these purposes by the payment of taxation, and of such subsidies as may be particularly levied for warlike purposes. Under these circumstances such a person is, or may be, clothed with hostile character. The criterion of his liability is the nature of his residence. If it is sufficient to amount in law to what is known as domicil, his property is treated as enemy. A man is said to have his domicil in a country when he resides there, 'not for a mere special and temporary purpose, but with a present intention of making it his permanent home.' [1]

The decisive question is therefore in all cases: Did there exist at the critical time the intention of indefinite residence? In answering this question the length of the previous residence and its object will no doubt be the determining considerations. But, as Lord Stowell said in the *Diana*: [2]—

'Mere recency of establishment would not avail to prevent the acquisition of domicil if the intention of making a permanent residence there was fully fixed upon by the party. The case of Mr. Whitehill established this point. He had arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned. Mere recency, therefore, would not be sufficient.'

Inasmuch as domicil depends upon the fact of habitation, a change of residence made in good faith after the outbreak of war will put an end to the enemy character.[3] In the same way a *bona-fide* sale of a vessel by a person domiciled

[1] Per Kindersley V.C. Lord *v.* Colvin, 28 L.T. Ch. 366.
[2] 5 C. Rob. at p. 60.
[3] The *Harmony*, ii. Rob. 322.

in enemy country may be good, but will be jealously examined.[1] As Dr. Lushington expressed it:[2]—

'This being a sale by a merchant now become an enemy, very shortly before the war, is a transaction requiring to be very narrowly investigated, and respecting which the court must exercise great vigilance lest the property of the enemy should be sheltered under a fictitious sale.'

Consistently with this principle, in the *Baltica*[3] a ship sold in contemplation of war by a domiciled enemy to his neutral son, and paid for only in part, was condemned as enemy's property.

6. **Enemy Persons in a State at the Commencement of Hostilities.**—Mediæval statesmen showed no indulgence to resident enemies, and Grotius[4] fully admitted that such persons might be treated as prisoners while the war lasted. He adds, however, that they ought to be released as soon as hostilities came to an end.[5] For many centuries a common stipulation in commercial treaties provided that the subjects of the contracting powers should have liberty to withdraw from each other's territories on the outbreak of war. Modern usage entitles us to lay down a positive rule, that such persons, independently of treaty, must be allowed a reasonable period within which to withdraw. The correct principle was long ago stated by Vattel:[6] The sovereign who declares war cannot detain those subjects of the enemy who are within his dominions; he must allow a reasonable period for withdrawal, on the ground that his permission to enter the territory tacitly involved a promise to afford protection and liberty to return. In this country *Magna Carta*, with admirable prudence, provided that enemy merchants found in England on the outbreak of war should be arrested

[1] *Ernst Merck*, 2 Spink 86. [2] *l.c.* p. 89.
[3] 1 Spink's Prize Cases, 264. [4] *De Jure Belli et Pacis*, III. ix. 4.
[5] In his day, ordinary prisoners were not released as a matter of course.
[6] *Droit des gens*, liv. III. ch. iv. § 63.

without injury to person or property, until it was ascertained how English merchants were treated by the enemy. The conduct of France in arresting all English subjects in that country, on the outbreak of war in 1803, has been universally condemned, and it is significant that even Napoleon attempted to justify the step as a retaliation, thus tacitly admitting its illegality under ordinary conditions. His action appears the more outrageous when it is remembered that in 1756 England had given the singular permission to French subjects to continue their residence in this country, on the condition of good behaviour during the war between the two countries. A similar tolerance has been so often stipulated for in treaties, that expulsion is now considered a vexatious exercise of strict belligerent rights, unless the circumstances are in some way exceptional. On the outbreak of the Crimean War, Russian merchants were not required to withdraw from England nor English from Russia. In 1870 Prussians resident in France were allowed to stay during good behaviour and *vice-versa*. The permission to Prussians was afterwards cancelled under circumstances of exceptional difficulty, so far as the department of the Seine was concerned. At the outbreak of the present Transvaal War almost all British subjects were expelled by the authorities of the South African Republic. It is probable that numerical considerations of an exceptional character justified the expulsion in this case.

6. **Revolutionary Hostilities.**—On the outbreak of rebellion or of revolutionary disturbance in a foreign country, a difficult question often confronts neutral governments. It becomes necessary to decide whether the hostilities are of such a character as to justify them in conceding to the revolting faction the status of belligerents. Recognition of belligerency will naturally long precede recognition of independence, and its justification must depend upon quite different grounds. The right to treat insurgents as belligerent persons is based on the material interests of the neutral, which may be gravely compromised by equivocal

disturbances. Following this principle as a guide, it becomes necessary to distinguish between cases when the civil hostilities are confined to land, and those when they extend to the sea. In the first case the neutral has little to gain by an early recognition of belligerency; in the second, such a recognition need not be delayed a moment after it has become clear that an organised struggle is in progress. Either there is a war in such a case or there is not; if there is, it may properly be recognised, if there is not, blockades, contraband restrictions, and the right of search are alike impermissible. It may therefore be laid down that as soon as an organised rebellion has reached such proportions as to involve demands upon neutrals which can only be supported upon the hypothesis that a state of war exists, the recognition of such a state becomes immediately legal.

This question was much discussed on the outbreak of the American Civil War in April 1861. The belligerency of the Confederate States was recognised by Great Britain on the 14th of May, and was bitterly resented by the United States Government. It is not easy to understand the American contention in view of the fact that on April 19 a blockade of the seven provinces had been declared by President Lincoln, involving an essentially warlike interference with the rights of neutral commerce. In a series of prize decisions the true view was stated by the Supreme Court of the United States:[1]—

'It is not the less a civil war with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in war, according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist, unless there be two belligerent parties. . . . As soon as the news of the attack on Fort Sumter, and the

[1] Prize causes, 2 Black 635.

organisation of a government by the seceding states, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May 1861, the Queen of England issued her proclamation of neutrality "recognising hostilities as existing between the Government of the United States of America and certain states styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.'

CHAPTER II

Combatant Persons and the Modes of Violence permissible towards them

1. **Combatants and Non-Combatants.**—The unratified Declaration of Brussels in 1874, and the recent Hague Conference in 1899, lay it down that 'les forces armées des parties belligérantes peuvent se composer de combattants et de non combattants.' Both within and without the regular armed forces of the belligerents, it is of great importance to determine the limits of combatant character. Combatants are entitled to some privileges, non-combatants to others; and a belligerent is entitled, in the ordinary run of cases, to demand securities that enemy individuals shall not be able to pass at pleasure from one class to the other. The Hague Peace Conference repeated Article 9 of the Declaration of Brussels on this point:—

The laws, rights, and duties of war are applicable not merely to armies, but also to militia and volunteer corps satisfying the following conditions:—

1. That of having at their head a person responsible for those under him.
2. That of wearing an irremovable and characteristic badge of a kind to be recognised at a distance.
3. That of openly carrying arms.
4. That of conforming in their operations to the laws and customs of war.[1]

[1] Peace Conference Blue Book. Miscellaneous, No. 1 (1899): 'Règlement concernant les Lois et Coutumes de la Guerre sur Terre,' sect. i. ch. i. article 1.

The more exacting claim has been sometimes made that combatants shall wear a uniform distinguishable at rifle range. The question arose in the Franco-Prussian War, in connection with the *franc tireurs*, who took up arms on behalf of France. Germany refused to recognise them as combatants on the ground that they wore no badge irremovable and distinguishable at rifle range. The claim is reasonable that the badge shall be of such a kind that a man may not suddenly convert himself by its removal from a combatant to a peaceful farmer, but to demand a badge distinguishable at rifle range is, as Mr. Hall expresses it, to require not merely a uniform but a conspicuous one. The tolerance at present conceded to guerilla troops is a bare one, and is less likely to be extended than curtailed. Thus a Prussian notice published at Vendresse in the Franco-Prussian War, declared that any person wearing plain clothes and fighting without government authority would be liable to ten years' imprisonment, or, in an aggravated case, to execution. Section 41[1] of the American instructions contains the following provision upon this point:—

Men, or squads of men, who commit hostilities . . . without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

2. Levies en masse.—A somewhat similar class of question arises in the so-called *levies en masse* of an invaded populace. Both at the Brussels and Hague Conferences a conflict of opinion disclosed itself on this point between the larger and smaller continental powers. The former showed a disposition to exact a more stringent degree of conformity

[1] Rule 82.

to the formalities of combatant character than the smaller powers held to be consistent with the desperate nature of the crisis. Article 10 of the Declaration of Brussels was finally adopted at the Hague:—

'The population of an unoccupied territory, which, on the approach of an enemy, takes up arms spontaneously to resist the invading force, without having had time to organise itself conformably to Article 9,[1] will be treated as belligerent, if it respects the laws and customs of war.' The British Delegate was anxious to move an additional article to this effect:

'Nothing in this chapter shall be considered as tending to diminish or suppress the right which belongs to the population of an invaded country to patriotically oppose the most energetic resistance to their invaders by every legitimate means.'[2] But M. de Martens substituted a somewhat vague pronouncement which was received with acclamation to the effect that 'unforeseen cases were not to be left to the arbitrary judgment of military commanders, but were to be placed under the safeguard of the law of nations, the law of humanity, and the requirements of the public conscience.'

It is clear that in the case of *levies en masse* it is not reasonable to require either a uniform or an explicit state authorisation. As to the uniform, Wellington wrote to Massena in 1810, in reference to the Portuguese Ordenanza: 'Il parâit que vous exigez que ceux qui jouiront des droits de la guerre soient revêtus d'un uniforme: mais vous devez vous souvenir que vous même avez augmenté la gloire de l'armée française en commandant des soldats que n'avaient pas d'uniforme.'[3] On the question of authorisation, the provisions of Article 9 must be considered as a disallowance of the German requisition made in 1871, that 'every prisoner, in order to be treated as a prisoner of war, shall

[1] Already quoted.

[2] Blue Book, Peace Conference, Misc. No 1 (1899), p. 161.

[3] *Wellington Despatches*, vi. 464.

prove that he is a French soldier, by showing that he has been called out and borne in the lists of a military organised corps, by an order emanating from the legal authority, and addressed to him personally.'

3. **Privateers.**—Turning for a moment to maritime hostilities, all authorised vessels belonging to the state are legitimate combatants. Privateers are vessels belonging to private individuals, but given a combatant licence by the sovereign. The nature of the rights enjoyed by privateers over captured property was well stated by Marshall, C. J., in the *Dos Hermanos*[1]: 'It is the settled law by the United States that all captures made by non-commissioned captors are made for the government; and since the provisions in the Prize Acts as to the distribution of prize proceeds, are confined to public and private armed vessels cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present must be in the nature of salvage for bringing in and preserving the property.' The law of privateering has become of secondary importance since the Declaration of Paris in 1856. Under the terms of that declaration, privateering may no longer be practised by the signatory powers when at war with another. The United States, Spain, and Mexico did not assent to the prohibition, the power first named basing its refusal on the convenience of privateers to a state without a powerful navy, as long as the right of capturing private property on the seas survives. It is noticeable, however, that in the Spanish American War both belligerents abstained from issuing letters of marque to privateers. Germany in 1870, and Russia in 1878, proposed to encourage 'volunteer navies,' which would have reintroduced, under a less offensive name, the characteristic evils of privateering. It is to be regretted that Great Britain, when appealed to by France on the earlier occasion, upheld a distinction subtle enough to annihilate, if generally adopted, the beneficial results of the Declaration of Paris.

[1] 10 Wheaton at p. 310.

4. **Permissible Limits of Violence.**—Not every mode or instrument of violence is permitted by the laws of war. The Declaration of Brussels laid down a series of rules upon these points which were accepted, though not ratified, by all the civilised powers, and which with some slight modifications were provisionally reasserted at the Hague Conference. These statements may reasonably be treated as authoritative, and have already in many cases passed into the manuals of war which are now commonly issued to their armed forces by belligerent powers. The draft articles of the Peace Conference are as follow:—

An unlimited choice is not permitted to belligerents of the means adapted to injure their enemy.[1]

The following acts are particularly forbidden:—

(*a*) The use of poison or poisoned weapons.
(*b*) The treacherous slaughter of individuals belonging to the enemy nation, or army.
(*c*) The slaughter of an enemy who has surrendered at discretion, having thrown down his arms, or possessing no longer the means of defending himself.
(*d*) The declaration that no quarter will be given.
(*e*) The use of arms, projectiles or substances, likely to cause unnecessary suffering; the employment of forbidden projectiles.
(*f*) The abuse of flags of truce, of the national flag, or of military badges and uniforms belonging to the enemy, as well as of the badges peculiar to the Geneva Convention.
(*g*) Any destruction or seizure of enemy property not imperatively called for by military necessities.[2]

The practice of sieges and bombardments is regulated as follows:—

Towns, villages, dwelling-houses, and buildings may neither be attacked nor bombarded, unless they are defended.[3]

[1] Art. xxii. [2] Art. xxiii. [3] Art. xxv.

The officer in command of attacking troops before beginning to bombard, except in cases of assault, should do all that he can to warn the authorities.[1]

In sieges and bombardments everything possible should be done to spare buildings devoted to worship, art, science, and charity, hospitals, and the resorts of the sick and wounded, so long as they are not used at the same time for military purposes.[2]

The besieged should indicate such buildings beforehand to the besieger by conspicuous and distinctive marks.

A town taken by storm may not be handed over to pillagers.[3]

5. **Bombardment of Coast Towns.** — A controversy of much gravity, and one of which more will be heard in the future, has been raised as to the propriety of holding to ransom, and failing payment, of bombarding the undefended coast towns of an enemy. In an article,[4] which became sufficiently notorious to attract the diplomatic attention of the British Government, M. le Contre-amiral Aube advocated a maritime policy for his own country which suggested alarming possibilities for the future. His argument had the merit of simplicity. War may be defined as the appeal of Right against Violence denying that Right: it follows that the paramount aim of war is to injure the enemy in every possible way. The nerves of war are wealth; consequently everything which strikes at the enemy's wealth, and still more at the sources of that wealth, becomes not merely legitimate, but obligatory. So we must expect in the future to see armed squadrons turn their powers of attack and destruction against coast towns, whether or not they be fortified, whether or not they be defended: they will burn them, destroy them, or at least hold them mercilessly to ransom.

Mr. Hall [5] adds the significant facts that Admiral Aube was appointed Minister of Marine soon after the publication

[1] Art. xxvi. [2] Art. xxvii. [3] Art. xxviii.
[4] *Revue des Deux Mondes*, 1882, 314-346. [5] P. 431.

of this article, that he gave orders for a class of vessels specially suited to carry out the designs recommended in it, and that in 1878 the Russian fleet at Vladivostock was about to sail for Australia, with the intention of holding the undefended coast towns to ransom. The Hague Conference contributed nothing in terms to a settlement of what is probably the gravest occasion of divergence still existing in the whole subject of belligerent rights, and we are thrown back upon practice and general principles for guidance. It is contended on the one hand [1] that the bombardment of places occupied by non-combatants is on the same level of illegality as devastation, that it is proposed to 'introduce for the first time into modern maritime hostilities a practice which has been abandoned as brutal in hostilities on land,' and that the analogy of contributions on land affords no sort of justification for the enforcement of ransom by a hostile squadron. Such contributions 'are a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which [the belligerent] is not, which he probably dare not enter, which he cannot hold even temporarily, and where consequently he is unable to seize and carry away.'

It may at once be admitted that the practice of bombarding undefended towns would be the occasion of much suffering to persons upon whom the incidence of belligerent pressure has been generally deemed illegitimate; nor can it be denied that a very grave accession to the inhumanities of war would be involved in its recognition. It may also be properly pointed out that before acts of this kind are done, states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth. Such arguments are indeed likely to be more effective than others based upon the attribution to non-combatant property of an absolute right to immunity from capture or destruction. The contention that such 'property is im-

[1] Hall, pp. 431-434.

mune is equally destructive of the claim to capture or destroy private property on board enemy merchant vessels. But, as Admiral Aube points out, in the American Civil War Confederate cruisers destroyed in a single month[1] 239 American vessels with an aggregate tonnage of 104,000, and value of 15,000,000 dollars. In cases where resistance was offered, it is reasonable to imagine that 'devastation and the slaughter of non-combatants' were not wanting to reinforce the persuasiveness of the summons to lie-to. Illustrations of this kind bring into curious relief the artificiality of much international practice. The most effective mode in which to meet Admiral Aube's suggestions is surely to say simply that the mode of belligerency advocated has never been practised or sanctioned, that it is strikingly inhumane, and would afford good ground for serious reprisals. It is hardly convincing to distinguish between the ransom which Admiral Aube recommends, and the contributions which are undoubtedly legal in continental warfare, on the ground that 'ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions.'[2] Mr. Hall is driven to admit that contributions may be exacted by a squadron which is prepared to enforce payment by landing a force: in other words, a ransom may be extorted at the barrel of a revolver which is denied to the cannon. 'A levy of money,' Mr. Hall continues,[3] 'made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right.' Might it not be argued with equal force that a contribution is a ransom from destruction? Certainly destruction would follow sharply, where an attempt to resist the levying of a contribution coincided with ability to pay it. Similarly it might be argued

[1] May 1864. [2] Hall. p. 424. [3] *Ibid.*

that if contributions are permissible, they are permissible because there is a right to destroy. The answer is that there may abstractedly exist the right to destroy upon refusal to pay the contribution, without there existing an absolute right to destroy, of which contribution or ransom is a mitigation.

6. **Dum-Dum Bullets.**—The permissibility of using Dum-Dum bullets was much discussed at the Conference. Explosive bullets in the strict sense have been discontinued since the Declaration of St. Petersburg 1868, but the representatives of Great Britain at the Hague refused to concur in an agreement which would have required all bullets to be cased in hard envelopes. Lord Lansdowne instructed Sir J. Pauncefote to inform the Conference that the Chitral campaign of 1895 had demonstrated the insufficiency of a hard envelope for stopping a savage rush. Her Majesty's Government were therefore unprepared to give up the mark IV. pattern, which has a small cylindrical cavity in the head, over which the hard metal envelope is turned down.

The Boer War has made it clear that soft-nosed bullets are no longer held to be permissible by this country in civilised warfare. The principle underlying all the prohibitions set forth above is clear enough. No suffering must be caused which is disproportionate to the military advantage gained thereby.

7. **Prisoners of War.**—A prisoner of war is defined by the American regulations as 'a public enemy armed or attached to the hostile army for active aid who has fallen into the hands of the captor . . . by individual surrender or capitulation. Quarter may not be refused to such persons. They may be detained till the conclusion of war, or they may be exchanged, or released on parole. They are of course subject to no punishment, and must, so far as possible, be supplied with reasonable nourishment.

The Hague Conference reasserted most of the articles of the Brussels Declaration on the subject of prisoners of war.

It is laid down that they must be humanely treated, and that all their personal belongings, except arms, horses, and military papers, remain their property.[1] They may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits: but they can only be confined as an indispensable measure of safety.[2] The state may utilise the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations. . . . The wages of prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release after deducting the cost of their maintenance.[3]

The government into whose hands prisoners of war have fallen is bound to maintain them. Failing a special agreement between the belligerents, they shall be treated as regards food, quarters, and clothing on the same footing as the troops of the government which has captured them.[4] Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary. Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight.[5]

Every prisoner of war, if questioned, is bound to declare his true name and rank, and, if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of his class.[6]

Prisoners may be set at liberty on parole if the laws of their country authorise it, and in such a case they

[1] Ch. ii. Art. iv. 1899.
[2] Art. v.
[3] Art. vi.
[4] Art. vii.
[5] Art. viii.
[6] Art. ix.

are bound, on their personal honour, scrupulously to fulfil . . . the engagements they have contracted.[1] . . . A prisoner of war cannot be forced to accept his liberty on parole: similarly the hostile government is not obliged to assent to the prisoner's request to be set at liberty on parole.[2]

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers . . . have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.[3]

8. **Spies.**—These rules have no application to captured spies. Of spies, Vattel[4] says: 'They are generally condemned to capital punishment, and not unjustly. . . . For this reason a man of honour, who would not expose himself to die by the hands of the common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery.' This view has received the sanction of both writers and soldiers, but it is difficult to defend upon satisfactory grounds. Stratagems and ruses are universally practised in war, and it is not easy to see that spying, unless aggravated by dishonouring circumstances in no way essential to it, is morally more culpable. The distastefulness of the employment, and its lack of distinction, together with the distressing nature of the penalty risked, call for remarkable valour and constancy in the spy. Lord Wolseley has recognised the reasonableness of the view in the following observations: 'As a nation we are brought up to feel it a disgrace even to succeed by falsehood. The word "spy" conveys something as repulsive as "slave." We keep hammering along with the conviction that "honesty is the best policy," and that truth always wins in the long-run. These sentiments do well for a copybook, but a man

[1] Art. x.
[2] Art. xi. The punishment for breach of parole is death.
[3] Art. xiii.
[4] *Droit des gens*, liv. III. c. x. §§ 179, 182, quoted Halleck.

who acts upon them had better sheath his sword for ever.'[1]

9. **Treatment of Wounded.**—The Conventions of Geneva, 1864, 1868, did much to ameliorate the condition of the sick and wounded. Ambulances, military hospitals, and the persons employed in such places, are neutralised. Inhabitants of the country bringing help to the wounded are to be respected. Wounded and sick soldiers shall be entertained and taken care of to whatever nation they belong. A distinctive and uniform flag is to be adopted for hospitals, ambulances, and evacuations. Neutralised individuals are to be distinguished by arm badges. A majority of the powers represented at the Hague Conference (Great Britain, the United States, Germany, and Austria forming a dissentient minority[2]) subscribed to a convention adapting these principles to maritime warfare. Hospital ships, whether equipped by the state or by individuals, are exempted from capture on producing a certificate to verify their neutral character. Such ships are bound to succour the wounded and shipwrecked independently of their nationality, and are to be distinguished by being painted white outside, with a horizontal band of green if equipped by the state, of red if equipped by private charity. The medical and hospital staff cannot be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their own private property. The shipwrecked, wounded, or sick of one of the belligerents who fall into the hands of the other, are prisoners of war. The captor must decide, according to circumstances, whether it is best to keep them, to send them to a port of his own country, to a neutral port, or even to a hostile port. In the last case, prisoners thus repatriated cannot serve as long as the war lasts. The shipwrecked,

[1] If the objection to spying is a moral one, the part played by those who employ him would appear to be less respectable than that of the spy himself. The latter at least puts his own neck into danger.

[2] The dissent was not based on any objection to the principle of the proposed rules.

wounded, or sick who are landed at a neutral port with the consent of the local authorities, must, failing a contrary arrangement between the neutral state and the belligerents, be guarded by the neutral state, so that they cannot again take part in the military operations. The expenses of entertainment and internment shall be borne by the state to which the shipwrecked, wounded, or sick belong.

Although, for various reasons, the formal adoption of the above rules was not universally made, it can hardly be doubted that they will form the standard of conduct in future maritime belligerency. In the stress of actual warfare suspicions will almost inevitably arise, and it is likely enough that, in isolated cases, actual abuse may be brought home to irresponsible persons. It is much to be hoped that patience, experience, and, above all, the sense of proportion, may induce commanding officers closely to scrutinise, and not to generalise from, each allegation of abuse.

CHAPTER III

Enemy Property

1. Enemy Property on Land, and Occupation of Enemy Territory

1. **Appropriable Property.**—Many exceptions to the old rule, that every species of enemy property may be appropriated at all times and in all places, have been admitted in the more tolerant practice of modern warfare. The principle underlying such exemptions is not always logically applied, but it has produced practical results of great importance. It is well stated by Mr. Hall in the following passage:[1]—

'Property can be appropriated, of which immediate use can be made for warlike purposes by the belligerent seizing it, or which, if it reached his enemy, would strengthen the latter either directly or indirectly; but, on the other hand, property not so capable of immediate or direct use, or so capable of strengthening the enemy, is insusceptible of appropriation.'

All public movable property belonging to the enemy state is subject to capture. In this class fall stores military and naval, state treasure, warlike materials generally, rolling stock, and many other articles too numerous to mention. Although state treasure may undoubtedly be confiscated, it is held according to the better view that documents constituting the evidence of debt can only be realised by an enemy, into whose hands they have fallen, when his possessory claim has been converted by conquest into a definitively

[1] *International Law*, ed. 2, p. 435.

proprietary right.[1] Article liii. of the Peace Conference dealt with the general question as follows:—

'An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the state, depôts of arms, means of transport, stores and supplies, and, generally, all movable property of the state which may be used for military operations.

'Railway plant, land telegraphs, telephones, steamers, and other ships, apart from cases governed by maritime law, as well as depôts of arms, and, generally, all kinds of war material, even though belonging to companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.'

A very humane modification, and one universally recognised in modern warfare, is stated in Article lvi.:—

'The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when state property, shall be treated as private property.

'All seizure and destruction of, or intentional damage done to, such institutions, is prohibited, and should be made the subject of proceedings.'

There can be little doubt that the public feeling of to-day would view with strong resentment any attempt to injure or remove valuable works of art, genius, or taste belonging to an enemy. France in her revolutionary wars enriched the galleries of Paris by the Corinthian Horses, the Dying Gladiator, the Apollo Belvedere, the Venus, and the Laocoon. In 1815 all pictures and other monuments of art which had been forcibly seized by Napoleon, or acquired by treaty, were returned to the places from which they had been respectively taken. It was contended that this act of expiatory justice was indefensible in view of Article ii. of the military convention under which the allies had entered Paris. That article was as follows: 'Les propriétés pub-

[1] Heffter, § 134. Halleck, vol. ii. p. 62. Phillimore, pt. xii. ch. iv. Hall, p. 436.

liques, à l'exception de celles qui ont rapport à la guerre, soit qu'elles appartiennent au Gouvernement, soit qu'elles dépendant de l'autorité municipale, seront réspectées et les Puissances alliées n'interviendront en aucune manière dans leur administration et gestion.'[1] The surrounding circumstances bear out Wellington's reply: 'I positively deny that this article referred at all to the museums or galleries of pictures.' The conduct of the allies was, however, strongly criticised by Sir Samuel Romilly in the House of Commons on February 20, 1816. He relied particularly upon the contention that many of the acts of restitution were wholly irrational in their effects. Thus Venice when plundered was Italian; in 1816, pursuantly to the Treaty of Campo Formio, she had become Austrian. The answer to this objection is that the restitution was made not to the political authority, but to the locality. Whatever changes may take place in the political circumstances of the kingdom of Greece, every one will desire the preservation in their present position of the remains of the Acropolis.

The immunities stated above have been hardly and gradually won, and it is still held that they must give way to real belligerent necessity. Thus in 1870, in the hope of bringing civilian pressure to bear upon the military authorities, the German forces bombarded Strasburg and destroyed the Library, Picture Gallery, and part of the Cathedral. The step perhaps was an extreme one, but behind the velvet scabbard of regulatory convention the presence of the sword is always discernible, and Lord Pauncefote, at the Peace Conference, was content to qualify the articles dealing with the conduct of war by the reservation, 'Saving the necessities of war.'[2]

[1] Quoted Halleck, vol. ii. p. 65.

[2] 'This reservation, Sir J. Pauncefote desired to point out, must be implicitly applied to any and to every code or compact by which it may be attempted to regulate the infinite variety of circumstances and conditions which arise in war.'—Memorandum of Sir J. Ardagh to Lord Salisbury, July 5, 1899.

2. Occupation of Enemy Territory.—The rights of an army in occupation of enemy territory were considered in the draft articles of the Declaration of Brussels and again at the Hague Conference in 1899, and although the conclusions finally adopted have not yet been formally ratified, they may be reasonably treated as authoritative. Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established and in a position to assert itself.[1]

The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, so far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[2] Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited.[3] Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.[4] Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated.[5] Pillage is formally prohibited.[6] If in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do it as far as possible in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate government was bound.[7] If besides the taxes mentioned in the preceding Article, the occupant levies other money taxes in the occupied territory, this can only be for military necessities or the administration of such territory.[8]

No general penalty, pecuniary or otherwise, can be

[1] Art. xlii. 1899. [2] Art. xliii. [3] Art. xliv. [4] Art. xlv.
[5] Art. xlvi. [6] Art. xlvii. [7] Art. xlviii. [8] Art. xlix.

inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.[1]

No tax shall be collected except under a written order and on the responsibility of a Commander-in-chief. This collection shall only take place, as far as possible, in accordance with the rules in existence, and the assessment of taxes in force. For every payment a receipt shall be given to the taxpayer.[2]

Neither requisitions in kind nor service can be demanded from communes or inhabitants, except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied. The contributions in kind shall, as far as possible, be paid for in ready-money; if not, their receipt shall be acknowledged.[3]

The occupying state shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile state, and situated in the occupied territory. It must protect the capital of these properties, and administer it according to the rules of usufruct.[4]

These provisions contain a few refinements hardly robust enough to stand the test of practice, but it is not likely that their substance will be seriously violated in future occupations.

The rights conceded to occupation naturally fall short of those allowed to definitive conquest, but, such as they are, they only come into existence where the occupation *de facto* is valid and effective. This requirement does not mean that every square mile must be secured by vedettes, but that from a military point of view, taking into consideration the

[1] Art. l. [2] Art. li. [3] Art. lii. [4] Art. lv.

nature of the country, and the degree of mobility attainable, the control of the occupying force must be reasonably complete and diffusive.

3. **Law and Policy.**—The degree in which the strict rights conferred by military occupation are enforced is determined in practice by political considerations. When the war is one of conquest, it is important to the belligerent that he should not exasperate to desperation a people over whom he aspires to rule peacefully: if, on the other hand, the occupation is certain to be temporary, greater indifference may be expected to the resentment of the inhabitants. The German occupation of France in 1871 was attended by many practices of great severity, and some at least of doubtful legality.

4. **Devastation.**—It has been much discussed how far a belligerent is entitled to lay waste the territory of his enemy. It need hardly be said that devastation was a familiar incident of mediæval warfare. It was felt, however, at a relatively early period that the practice could only be justified by the strictest military necessity. Thus Evelyn in his *Memoirs*[1] says in 1694: 'Lord Berkely burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of levying war was begun by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.' Nearly a century later Vattel speaks with much greater certainty: 'Such acts are awful extremities when a nation is driven to them, barbarous and unspeakable excesses when done without necessity.' It must be observed that even now occasions might easily arise sufficient to excuse devastation. The act of de Vendôme in cutting the dykes and flooding the country from Ghent to Ostend in order to cut Marlborough's communications was clearly within his belligerent rights. The permissibility of a particular act may be determined by reference to two admitted principles

[1] iii. 335, cited by Hall.

which Professor Westlake[1] has well stated for a more general purpose :—

1. Everything is prohibited which is not of a nature to contribute to success in the military operation concerned.
2. Even when a thing does not fall under any absolute prohibition, it may only be done in the circumstances, and in the measure, in which it may reasonably be expected to contribute to the success of the (military operation) concerned.

5. **Contributions and Requisitions.**—The practice of general pillage has finally given way to the regulated incidence of contributions and requisitions. Contributions are forced loans levied by an invader from the inhabitants of an occupied country to take the place of requisitions or as a substitute for taxation. Requisitions are orders given by authorised officials of the invading army to the inhabitants of the district invaded, requiring them to provide labourers, stores, or other articles, of which the invader stands in need. The payment of such sums is met by the belligerent, upon whom repayment is imposed by the articles of peace. Belligerent necessity, as it presents itself to the mind of the invader, is the only limit upon the amount of requisitions and contributions. In the Franco-Russian War the rights of the army of occupation were pushed in this respect to extremity, and, when we speak of private property on land as immune from capture, it must not be forgotten that the practice of requisitioning involves a serious qualification of this doctrine.

2. Enemy Property on the Sea

6. **Capture of Merchant Vessels.**—The private property of the enemy taken at sea is generally liable to

[1] *International Law*, p. 236.

capture and confiscation. Continental and American writers have long sought to extend the comparative immunities of enemy property on land to this case also. 'Il est à désirer,' said Napoleon, 'qu'un temps vienne, où les mêmes idées libérales s'etendent sur la guerre de mer et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simples matelots de commerce.'[1] Similarly the United States in 1856 offered to give up privateering if the following provision were added to the Declaration of Paris: 'And the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.' It is not seriously pretended that the existing law of nations forbids such capture: but it is claimed that 'the immunity would be universally recognised as another restraining and humanising influence imposed by modern civilisation upon the art of war.'[2] This proposition may be fully admitted without in any way exhausting the controversy. The real question at issue is whether the effect of maritime capture upon the event of hostilities is sufficiently direct and decisive to bring it within the protection of recognised principles. The argument from land analogy is somewhat misleading. Maritime capture is marked by little of the bloodshed and violence which are inseparable from such seizure on land: the objects of capture are almost always directly contributory to the enemy's strength, and by means of insurance the loss is distributed among the whole community. Mr. Wheaton[3] adds the further distinction:—

'An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its

[1] *Mémoires*, iii. c. vi. cited Halleck.

[2] The American Secretary of State to Baron Gerolt in 1870, cited by Hall.

[3] Third English edition, p. 484.

territory and appropriate its rates and taxes, and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small or with no fleet. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation.'[1]

Private property belonging to the enemy and carried in neutral ships is now immune from capture. The conditions of the immunity will be dealt with under the head of neutrality.

7. **Changes of Nationality.**—It is often important to determine the ownership of property captured at sea, for its nationality, and therefore its liability to capture, may be involved therein. If the goods are shipped at the consignor's risk, the ownership is in him. Lord Stowell, in the *Packet de Bilboa*,[2] made the following observations upon this point:—

'In times of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal

[1] It is of course a different question, and one properly lying outside the scope of this book, whether the interest of a particular country is best secured by the retention or abolition of the practice. But as the opposition of Great Britain is undoubtedly the great obstacle to a change, it is well worth considering how far this country gains by the existing practice. It can hardly be supposed that our enormous carrying trade would remain with us to abide the inconvenience to which carriage in enemy's ship still subjects neutral goods. A still more important argument may be drawn from the absolute dependence of this country upon imported supplies. To a continental power the complete destruction of its commerce, though a weakening, could hardly ever be a decisive blow: to Great Britain it would of course be the end of all things. It is no doubt true that the one is incalculably more likely to happen than the other, but with all allowance made, the judiciousness of English policy is a question requiring the gravest consideration. Even the certainty of enormous maritime captures may be too dearly bought.

[2] 2 C. Rob. 134.

in contracting that the whole risk should fall on the consignors. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not. . . . In time of war this cannot be permitted, for it would at once put an end to all captures at sea: the risk would in all cases be laid on the consignor, when it suited the purpose of protection. . . . The captor having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war must be presumed to know the rule.'

8. **Decisions.**—The commencement of the voyage is the critical period, whether the enemy is the consignee or the consignor. In the *Josephine*[1] it was held that silver consigned by an enemy shipper to his agent in Hamburg, for the purpose of answering drafts of a correspondent in America, without any letter of advice putting it out of his control, must be treated as the property of the shipper. The courts of the captor do not recognise claims against captured vessels, which would have been effective as against the original owners. In our legal phrase the goods are acquired free from equities. Thus in the *Marianna*[2] it was held that a claim cannot, in a prize court, be founded upon a lien on freight for the payment of the purchase price of a vessel. Similarly in the *Tobago*[3] it was held that bottomry[4] on an enemy's ship is not an interest that can support a claim in a prize court on behalf of the bondholder.

9. The sale of a ship, absolutely and *bona-fide*, by an enemy, to a neutral *imminente bello* or even *flagrante bello*, is not illegal, nor is such a vessel necessarily condemned, even though part of the purchase money remains unpaid.[5] But as Lord Stowell observed in the *Sechs Geschwistein*,[6] the circumstances will be jealously examined: 'The rule which

[1] 4 C. Rob. 25. [2] 6 C. Rob. 24. [3] 5 C. Rob. 218.

[4] 'Bottomry is a species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged (*partem pro toto*) as a security for the repayment of a sum of money.'—Wharton, *Law Lexicon*, § v.

[5] The *Ariel*, 11 Moore P. C. 119.

[6] 4 Rob. 100.

this country has been content to apply is that property so transferred (that is, by purchase from an enemy) must be *bona-fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether.[1]

[1] Cited by Sir John Patteson in the *Ariel*, *l.c.* at p. 132.

CHAPTER IV

Postliminium and Conclusion of War

I. Postliminium

1. **Origin of Term.**—In Roman law the right of postliminium was the right which could be alleged by escaped prisoners entitling them to resume their legal status, as if they had never been away from home. 'Postliminium fingit eum qui captus est in civitate semper fuisse.'[1] The imposing title, and indeed the fiction itself, are hardly required in international law to express the fact that the rights of an owner are suspended, not destroyed, by occupation or capture, and revive when the suspending circumstance ceases to be operative. If a ship has been captured and is recaptured, postliminium, subject to the obligation to pay salvage, comes to the aid of the original owner. The Roman doctrine has bequeathed to the law of nations little beyond the *damnosa hereditas* of a pretentious title; the re-entry into rights of ownership does not depend upon the fiction that they have never been interrupted, for it is conditioned upon a recognition of liabilities legally contracted by the other belligerent during the period of interruption. The modern doctrine has no application except during hostilities, for every treaty of peace, unless the contrary is explicitly stated, is tacitly based on the principle of *uti possidetis*.[2] Private property upon land, not being a proper subject for capture, postli-

[1] Postliminium depends upon the fiction that a prisoner has never left his own state.

[2] Keeping what one has.

minium is generally limited in its effect to the national territory and to captured vessels. A controversy which arose in 1871 illustrates the meaning of the doctrine. During the Prussian occupation of France, the Prussian Government entered into contracts with certain persons for the sale of some public French forests. The price was paid by the purchasers in advance. When the Prussian occupation ceased, they claimed to be entitled to finish cutting down the trees for which they had already paid. This view was not accepted by the French authorities, and was negatived by an additional article in the Treaty of Peace in December 1871. The French rights revived by postliminium the moment the Prussian occupation came to an end. France was bound by all executed contracts, and generally by the status *in quo*, but in view of the revival of her sovereignty, was not bound to acquiesce in acts which amounted to an executory derogation therefrom.

2. **Salvage.**—When captured ships are recaptured by the owner's fellow-countrymen or allies, they are not held by the recaptor as original prize, but revert to the prior owner, subject to his obligation to pay salvage. This subject is strictly municipal in its character, except in so far as the rights of allies and neutrals may be concerned, but a brief explanation of the principles and rules of salvage may be usefully added to this chapter. Bynkershoek quotes the old *Consolato del Mare*, the earliest of mediæval maritime codes, to the effect that restitution was only due, if the ship was recaptured before removal to a safe place; if, on the other hand, it had been so removed since the plenary ownership had passed to the enemy, recapture absolutely transferred both ship and cargo to the recaptor. According to the ancient laws of both England,[1] Scotland,[2] and France,[3] the same practice obtained, and the title of the original owner was obliterated. An English Ordinance of 1649, issuing from the Long

[1] See Crompton, *Court d'Admiraltie d'Engleterre*, p. 91.
[2] Lord Stair's *Decisions*, vol. ii. p. 507.
[3] Valin, lib. iii. tit. 9, art. 8.

Parliament, directed restitution of recaptured vessels to British subjects upon payment of salvage, without regard to intervening dealings other than adoption into the public service of the captors.[1] The *Consolato del Mare* required that the recapture should take place before the vessel had been removed to 'a safe place,' a requisition sometimes known as the *infra præsidia* rule; other authorities adopted a time limit of twenty-four hours in order to extinguish the owner's title, a test spoken of by Valin[2] as the common law of Europe. A very interesting judgment of Lord Mansfield's in Goss *v.* Withers,[3] suggests that neither of these tests was ever accepted in the English prize courts:—

'I have taken the trouble to inform myself of the practice of the court of admiralty in England before any Act of Parliament commanded restitution, or fixed the rate of salvage: and I have talked with Sir George Lee, who has examined the books of the court of admiralty, and informs me that they held the property not changed, so as to bar the owner, in favour of a vendee or recaptor, till there had been a sentence of condemnation; and that, in the reign of King Charles II., Sir Richard Floyd gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer, after she had been fourteen weeks in the enemy's possession, because she had not been condemned.'

The judgment of Sir W. Scott in the *Flad Oyen*[4] was to the same effect, and, so far as English prize courts are concerned, the rule may be clearly stated that no neutral may safely buy an English vessel in the enemy's hands until it has been formally condemned in a competent court. As between British subjects not even condemnation can extinguish the title of the original owner in the event of recapture; his ownership revives by virtue of postliminium in every case except when his ship has been converted into a public vessel of the capturing power. The amount of

[1] See Sir W. Scott's judgment in the *Ceylon*. 1 Dodson Admiralty at pp. 117, 118.

[2] Valin *sur l'ordonnance*, lib. iii. tit. 9, art. 8.

[3] 2 Burr at p. 694.

[4] C. Rob. 135.

salvage payable varies in different countries. In England the ordinary rule is one-eighth of the ship's value; in the United States one-eighth, if the recapture was due to a public ship, one-sixth if to a privateer. French law directs restitution on payment of one-thirteenth of the value in case of recapture by a public vessel, if such recapture takes place within twenty-four hours of the original seizure, after that period the proportion payable rises to one-tenth. In Denmark the amount claimable from the original owner is one-third, in Sweden one-half, in Spain and Portugal one-eighth.

2. Conclusion of War

3. **Treaties of Peace.**—In theory there is no reason why a war should not be brought to an end by the mere cessation of hostilities without any formal agreement. Such was the end in 1716 of the war between Sweden and Poland, and the Spanish colonial campaign in 1824 perished in the same way from inanition. It is, however, the almost invariable practice to restore a state of peace and determine its conditions by an armistice followed by a formal treaty of peace. The effect of such a treaty is entirely to extinguish the subject of dispute between the contracting parties. In practice a specific renunciation of the object in controversy is frequently required from the defeated party; but whether it be particularly inserted or not, the text-books lay down the academic proposition that recourse to arms is not again permissible for the same object. A treaty of peace will naturally provide for the settlement of outstanding territorial disputes between the signatory parties, but on all points where it is silent the principle of *uti possidetis* comes into play. Consistently with that principle, except in so far as the treaty itself contains other provisions, both parties keep what they hold when the instrument is drawn up.

4. **Their Effects.**—The restoration of peace revives all private rights between the subjects of the belligerents which

have been suspended by the war: further, it makes ransom bills and the contracts of prisoners of war immediately actionable.

The operation of a treaty of peace commences at the moment of signature, and nice questions have arisen as to the responsibility of subjects for belligerent acts done after the treaty has been signed, but before they are affected with notice of its conclusion. For such intermediate acts it is now agreed that there is no criminal liability. On the question of civil liability Lord Stowell expressed the reasonable view in the *Mentor*:[1]—

'I incline to assent to Dr. Lawrence's position, that if an act of mischief was done by the king's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. . . . If the officer acted through ignorance, his own government must protect him; for it is the duty of governments, if they put a certain district within the king's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through those persons, they are to be borne harmless at the expense of the government whose duty it was to have given that notice.'

In every treaty of peace is implied, or expressly set forth, an indemnity clause extinguishing all claims for damage done in war, or springing from warlike operations. 'I will not take upon myself to say,' said Lord Stowell,[2] 'that a treaty of peace puts an end to all questions of property between the subjects of the states entering into the treaty; perhaps it may be more strictly correct to say that it quiets all titles of possession arising out of the war only. At the same time, when a treaty of peace has been concluded, the revival of any grievances arising before the war comes with a very ill grace, and is by no means to be encouraged.'

[1] 1 Ch. R. at p. 182.
[2] In the *Molly*, 1 Dodson 395.

5. **Conquest.**—Conquest is the permanent absorption of all or part of the territory of a defeated enemy.[1] A title resting upon conquest is not complete until the conqueror has satisfied two requirements. In the first place, he must possess the material strength to make his conquest good, and in the second, he must have, and exhibit, the intention of appropriation. The rights of an occupier naturally fall far short of those conceded to conquest, and it is sometimes difficult to determine when the one has definitively passed into the other. The leading case on this point is known as the case of Hesse Cassel. In 1806 the Elector of Hesse Cassel was driven from his electorate by Napoleon, and remained excluded for eight years. For a year after his expulsion Napoleon governed Hesse Cassel under military law, and then incorporated it in the kingdom of Westphalia. Jerome Bonaparte was placed on the throne of this newly created kingdom, and his succession was recognised by the treaties of Tilsit and Schönbrunn. Prior to his expulsion the Elector had lent money on mortgage to one Count Hahn Hahn: the latter had received a discharge in full from Napoleon on payment of part of the money advanced. On his return the Elector instituted proceedings against the estate of his debtor, who had died in the meantime, thus raising the whole question of the validity of Napoleon's acts. If Napoleon had effected a definitive conquest of Hesse Cassel, the acts sought to be set aside were well within his legal rights. The Elector had joined the Prussian forces, and was therefore in arms against the lawfully constituted authorities of his country. This circumstance justified confiscation of his private property within the dominion, while the conqueror succeeded to all public property by a species of universal succession. The question was therefore one of fact, and was carried from the Mecklenburg court to the Universities of Kiel and Breslau, and thence by way of appeal to a further University. This ultimate tribunal

[1] Succession by conquest is a species of universal succession. The conqueror succeeds to both the assets and liabilities of the conquered.

declined to recognise the Elector's claim on the grounds that Napoleon's conquest had been definitive, that the Elector had been treated by the treaties of Tilsit and Schönbrunn as 'politically extinct,' and that his restoration was not a continuation of his former rule, but a government beginning *de novo*, and inheriting only what was left by its legal predecessor.

6. **Other Effects of Conquest.**—The complete conquest of a country has the effect legally of converting the inhabitants of the conquered country into citizens of the conqueror's state. Where, however, a country cedes a portion of its territory to a conqueror, it is usual to stipulate that the inhabitants of the portion ceded shall be at liberty to retain their nationality of origin on condition that they leave the territory ceded. The rights of such persons were much considered in the American case of United States *v.* Repentigny,[1] when it was laid down by Mr. Justice Nelson on behalf of the Court:—

(1) That on a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, deprive themselves of protection and security to their property, except so far as it may be secured by treaty.

(2) When on such a conquest it was provided by treaty that the former inhabitants, who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

[1] v. Wallace 211.

PART IV

THE RIGHTS AND DUTIES OF NEUTRAL POWERS

CHAPTER I

General Principles of Neutrality between State and State

1. The law of neutrality differs from other branches of international law in the comparative certainty with which its rules may be stated. The outbreak of every war affords occasion for the exercise of neutral duties and the concession of neutral rights; belligerents are, as a rule, unwilling to add to their complications by the commission of acts which as between themselves and neutrals are of doubtful legality, and the decision of their prize courts have, on the whole, been successful in evolving a body of harmonious and intelligible doctrine.

Supply of Troops.—The development of opinion has tended to impose stricter obligations upon neutral powers than were at one time required. It has long been verbally admitted that a neutral is obliged to exhibit impartiality between belligerents, and that the latter are correlatively bound to abstain, in deference to the sovereignty of the neutral, from making any military use of his territory or his territorial waters. Earlier usage, however, was content with a standard of impartiality which fell far short of later requirements. It was common for neutrals to supply troops to one of two belligerents, under a previous treaty, nor was the practice held to involve any deviation from neutrality. A treaty of 1781 bound Denmark to supply certain troops

to Russia in the event of war. In 1788 war broke out between Russia and Sweden. Pursuantly to the provisions of the treaty, Denmark furnished the contingent promised, and defended her conduct in so doing by a declaration sent to Sweden. It ran as follows:—

'His Danish Majesty has ordered the undersigned to declare that although he complies with the treaty between the courts of Petersburg and Copenhagen in furnishing the former with the number of ships and troops stipulated by several treaties, and particularly that of 1781, he yet considers himself in perfect amity and peace with his Swedish Majesty; which friendship shall not be interrupted, although the Swedish arms should prove victorious, either in repulsing, defeating, or taking prisoners, the Danish troops now in the Swedish territories, acting as Russian auxiliaries, under Russian flags. Nor does he conceive that his Swedish Majesty has the least ground to complain, so long as the Danish ships and troops now acting against Sweden do not exceed the number stipulated by treaty; and it is his earnest desire that all friendly and commercial intercourse between the two nations, and the good understanding between the courts of Stockholm and Copenhagen, remain inviolably as heretofore.'[1]

The Swedish representative agreed to the proposal on grounds which were carefully stated to be merely politic, and added that the Danish contention 'is a doctrine which his Swedish Majesty cannot altogether reconcile with the law of nations and rights of sovereigns, and against which his Majesty has ordered (Baron de Sprengtporten) to protest.'[2] This incident is believed to supply the last occasion on which such assistance has been given by a neutral with impunity, and the practice may now be confidently pronounced extinct. The rendering of military assistance by A to B, while the latter is at war with C, is essentially an unneutral act, and it is no answer to C's complaint that A was under contract to commit the act of illegality. Such an injury to C constitutes a *casus belli*, and

[1] Cited by Phillimore.

[2] *Annual Register* (1788), vol. xxx. pp. 292, 293.

the fact that it may be impolitic so to treat it is without bearing upon the legal question.

2. **Neutral Money Loans.**—It would be clearly a violation of neutrality for a neutral state to make a money loan to a belligerent, but the question is more open to doubt in cases where the loan issues from neutral individuals. Money is an ordinary commodity of trade, and, as will be seen later, the neutral right to trade remains, on principle, unaffected by war. According to the better view, if the transaction is merely a commercial one, providing for the *bona-fide* payment of reasonable interest, it involves no derogation from neutrality calling for government interference. To this effect were the opinions of the English law officers given in reply to Mr. Canning in 1823: 'With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations, and the practice that has prevailed, that they would not be an infringement of neutrality.' It has been decided in America [1] and in England [2] that it is illegal for individuals to raise money by way of loan to assist subjects of a foreign state, so as to enable them to prosecute a war against their own government, while the latter is in amity with that of the lenders. In cases where the belligerent persons are independent powers, the right of neutral individuals to make *bona-fide* loans is well recognised in practice. Mr. Hall notices that during the Franco-German War both the French loan and part of the North German Confederation loan were issued in England.

3. **Foreign Enlistment.**—Volunteering on the part of neutral individuals for the service of belligerents has long been forbidden by municipal systems. In this country it was provided, as long ago as the reign of George II., that if any subject of Great Britain shall enlist himself . . . in any foreign service . . . without licence under the king's sign-manual, he shall be guilty of felony without benefit of clergy.[3]

[1] Kennet *v.* Chambers, 14 Howard 38.
[2] De Wütz *v.* Hendricks, 9 Moore 586.
[3] 9 Geo. II. c. 30, 29 Geo. II. c. 17.

Such acts are, moreover, generally forbidden in terms by proclamations of neutrality issued on the outbreak of war. At the same time, it is held that isolated cases of disobedience are not imputable to a government which has observed proper precautions. There is reason to believe that the number of foreigners serving with the Boer forces in the recent war was considerable, but there was no disposition to see in that circumstance a derogation from the neutrality of the states to which they respectively belonged.

4. Under the same head as the last falls the prohibition imposed upon neutrals from allowing their territory to be used by a belligerent in a mode derogatory to the neutral sovereignty. Canning, in a speech delivered in 1823, referred to a memorable American precedent:—

'If I wished,' said he, 'for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel fitting out was seized, delivered over to the tribunals, and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain.'[1]

Mr. Jefferson's opinion was elicited by the extraordinary views of belligerent right held by Mr. Genêt, then French Minister in the United States. Besides the acts referred to in the above passage, complaint was made that he issued commissions to American citizens to fit out privateers and prey upon British commerce. Mr. Jefferson, in a note to

[1] Canning's *Speeches*, vol. v. pp. 50, 51.

the American ambassador in Paris, indicated the element of illegality with great propriety :—

'The right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent. . . . If the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments.'[1]

5. **Alabama Case.**—The soundness of Mr. Jefferson's conclusion has never been seriously questioned, and the proposition is now elementary that a neutral may not permit a belligerent either to arm vessels or issue commissions within the neutral jurisdiction. It has not, however, always appeared equally clear whether the neutral may himself supply arms and military equipment to belligerents. The better opinion is that such sales are inconsistent with neutral duty in cases where the neutral state is itself the vendor. The Swedish Government acted on this principle in 1825, and cancelled, in deference to a Spanish remonstrance, the sale of six frigates which had been purchased mediately on behalf of the Mexican insurgents. The case of neutral individuals who, unlike their government, are traders in arms, is judged by a correspondingly different standard. Traffic in arms is permitted to such persons, and is powerless to compromise the neutrality of their government, but, as the supply of arms to one belligerent is clearly injurious to the other, the latter is permitted to repress the traffic on his own behalf. This question belongs therefore to the subject of contraband. The dividing line between acts which the neutral government is bound to restrain, and those in which its subjects are permitted to engage at their peril, is not always easy to determine. If such a government is not bound to prevent its subjects from supplying guns to a belligerent, may

[1] *American State Papers*, i. 116. *Cf.* Wolfius, *Jus Gentium*, § 754, and Vattel, *Droit des gens*, III. c. ii. § 15.

it acquiesce in the preparation and sale of an armed vessel under the same circumstances? On principle, the cases are hardly distinguishable. 'There is nothing,' said Story, J., in the *Santissima Trinidad*,[1] 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit. . . . It is apparent that though equipped as a vessel of war [the *Independencia*] was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality.' The difficulty in particular cases is to determine whether the vessel in the circumstances under which it was sold amounts to an 'expedition' which the neutral is bound to restrain, or is merely a contraband article. The distinction was brought into great prominence at the time of the American Civil War in connection with the notorious *Alabama*. This vessel, which was evidently intended for warlike purposes, was launched at Liverpool on May 15, 1862. The United States minister drew the attention of the British Government to the fact that the vessel was intended for the Confederate States, and demanded its arrest. A week later the law officers of the crown advised that 'if sufficient evidence can be obtained to justify proceedings under the Foreign Enlistment Act, such proceedings should be taken as early as possible.' The difficulty was that the provisions of the existing Foreign Enlistment Act (59 Geo. III. c. 69) were far from satisfactory. Their inadequacy was pointed out in the *Alexandra*[2] by the Court of Exchequer, when an opinion was expressed by Baron Bramwell that the material sections prohibited that equipment only of a vessel by a neutral, which was itself such that by means of it the vessel could commit hostilities, and that no equipment which gave no means of attack and defence was within the section. The

[1] 7 Wheaton, 346.

[2] 2 Hunslet and Cott. 431; *cf.* the ship *Mermaid*, Bee's *Am. Adm. Rep.* 69.

learned Baron added[1]: 'I think that a vessel departing neither armed nor equipped so as to be capable of attack or defence is not a violation of international law, be its object what it may. . . . I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a warlike equipment; that equipment may leave in another vessel and be transformed to her as soon as the neutral limit is passed or at some not remote port, and thus the spirit of international law may be violated, and the letter and spirit of the municipal law evaded.' Similar views seem to have been taken by the English commissioners of customs in the *Alabama* case. They acted on the assumptions that a ship is *prima facie* a subject of innocent merchandise, that the neutral is only concerned to see that at the time of leaving the territory it is 'incapable of attack and defence,' and that the implements of attack and defence may follow separately from a different part of the neutral territory without a violation of it, provided that the junction does not take place till the neutral zone is crossed. The *Alabama* was allowed to leave for the Azores, where she met the *Bahama* and the *Agrippina*, also from England, from which she obtained crews and military supplies. The English authorities were ignorant of the connection between these vessels and the *Alabama*. The latter vessel received a commission as a Confederate cruiser, and the extent of the destruction which she afterwards wrought on the commerce of the enemy is well within living memory. The facts in connection with the *Florida* were very similar. The United States made a heavy claim against the British Government in respect of their alleged default, claiming in addition to the damages directly occasioned by these vessels, indemnity for—(1) The increased rates of insurance in the United States made necessary by their depredations. (2) The transfer of the American carrying trade to England. (3) The prolongation of the war. After long negotiation it was agreed by the Treaty of Washington in 1871 that the questions at issue

[1] *U.S.* at p. 542.

between the two countries should be submitted to arbitration. The arbitrators met at Geneva in the same year. In estimating the legal value of their findings, it must not be forgotten that their authority depended merely on the mandate of two individual nations, and that the terms of the reference imposed upon them standards of conduct into the legality of which they were not concerned to inquire. The rules by which their decision was to be guided were contained in Article vi. of the Treaty, and ran as follows:—

'A neutral government is bound —

'First, To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a power with which it is at peace, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

'Secondly, Not to permit or suffer either belligerent to make use of its ports or waters, as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

'Thirdly, To exercise due diligence in its waters, and as to all persons within the jurisdiction, to prevent any violation of the foregoing obligations and duties.'

6. **The Award.**—The Arbitration Tribunal, on this reference, condemned Great Britain to pay to the United States in respect of the damage done by the *Alabama*, the *Florida*, and their tenders, the sum of $15,500,000. The American claims in respect of indirect damage were rejected at an early stage. The three rules on which the award depended had merely a conventional authority; they are very vague and general in their language,[1] and they appear to throw upon neutrals duties of intolerable irksomeness and

[1] For instance, the whole question turns on the consideration what is 'due diligence.' The phrase is used in the rules as if there was an accepted standard.

responsibility. The dividing line between legitimate and illegitimate commerce is very difficult to draw in particular cases, but the distinction of principle is less obscure. The export of weapons by neutral subjects is a legitimate branch of commerce subjecting the goods to seizure as contraband, but in no case involving their government: on the other hand, a neutral government is bound to prevent its subjects from handing over a commissioned armed vessel to a belligerent within neutral territory, for to do so is to countenance an expedition. A vessel may without illegality be built, armed, and transferred to a belligerent within the territory if it is neither commissioned nor ready for immediate hostilities.

A tendency has been shown to extend on this point belligerent requirements, and it is likely enough that a violation of the above rule will be held to have taken place where it is verbally observed, but broken in its spirit. An effect of this tendency may be found in the increasing stringency of municipal requirements,[1] and a resolution of the Institute of International Law in 1875 supplies a further illustration.[2]

7. **Terceira Incident.**—The well-known Terceira incident establishes the principle that a neutral must use reasonable diligence to prevent colourable violations of its neutrality when the several parts of a hostile expedition, each being in itself innocent, leave the jurisdiction separately and combine outside it. In 1827 during the civil war in Portugal between Donna Maria and Don Miguel, Count Saldanha left England with four ships intended for the service of Donna Maria at Terceira, but bound ostensibly for Brazil. The expedition was unarmed, but military stores also clearing from

[1] Italy, Austria, Spain, and Denmark forbid the equipment of armed vessels for a belligerent.

[2] L'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.

this country had preceded it. It was intercepted by H.M.S. *Ranger* off Port Praya in Terceira and escorted back. The interference was entirely justifiable in essence, but its exercise in Portuguese sovereignty was itself open to criticism.

8. **Neutral Rights.**—The points which still require treatment in this chapter may be more conveniently dealt with under the correlative head of neutral rights, though the observation of Mr. Jefferson already quoted must not be lost sight of, that if a neutral government enjoys as regards one of the belligerents a right, it is bound, as regards the other, to enforce it.

Neutral states are then both entitled and bound to demand that the belligerents shall abstain from hostilities in their territory or their territorial waters. In 1863 an American man-of-war found and captured the Confederate vessel *Chesapeake* off Sambro, a harbour of Nova Scotia. The legality of the act was not seriously maintained, and the American reply to the English complaint could find no better plea in law than that the captain had acted 'under the influence of a patriotic and commendable zeal to bring to punishment outlaws who had offended against the peace and dignity of both countries.' In the *Anna*[1] Lord Stowell directed restitution of a merchantman captured within three miles of some mud islands situate in the mouth of the Mississippi, but more than three miles from the mainland. 'I am of opinion,' he observed,[2] 'that the privateer has laid herself open to great reprehension. Captains must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the very river itself.'

Bynkershoek[3] maintained a qualification to the above rule which has never prevailed, though it has been sometimes relied on. He alleged that a belligerent might legally push home to neutral waters a chase commenced in the open sea.

[1] 5 C. Rob. 373. [2] P. 385.
[3] *Quæstiones juris publici*, i. 8.

He might finish his capture *dum fervet opus*.[1] The alleged exception is unsupported by authority.

9. A belligerent attacked in neutral territory forfeits his redress against the neutral, if he attempts to defend himself; this doctrine was laid down by the President of the French Republic, acting as arbitrator in the 'General Armstrong' dispute between this country and the United States. The ruling is at first sight harsh, but it is strictly logical. The aggrieved belligerent has 'made his election' between two remedies, and his resistance, though defensive, was itself a violation of the rule that hostilities are unlawful in neutral territory. A belligerent who has suffered from a violation of neutral territory by his enemy is entitled to demand that the neutral shall take such steps to procure an indemnity as he might reasonably be expected to adopt, having regard to the circumstances, in a case in which his own interests were involved.

10. **Right of Asylum.**—A neutral is allowed, consistently with his continuing friendship towards both belligerents, to receive their troops or vessels within his territory under circumstances which ensure that the use of his hospitality will be unaggressive in its direct and indirect results. Under these circumstances a French army sought and obtained shelter in Switzerland in 1871. Such reception is properly conditioned, in the case of land forces, upon an agreement by the fugitives to undergo disarmament in crossing the frontier, and internment within the neutral territory, as long as hostilities last. In the case of maritime warfare the requirements of neutral hospitality are less exacting. Thus a neutral may freely supply repairs, pacific stores, and sufficient coal to carry the belligerent vessel to the nearest port in her own country. It was soon recognised that the practical assertion of neutral protection could only be made by the aid of special restrictions, where vessels belonging to two belligerents both happened to meet in the same neutral harbour. Early in the eighteenth century the practice sprang up of detaining a privateer vessel

[1] While the chase is hot.

for twenty-four hours after the departure of its enemy. This rule has now become almost as universal in the case of public vessels of war as it formerly was of privateers. The twenty-four hours' rule itself is not incapable of abuse,[1] and there are signs that a stricter practice is in course of growth, which will limit the stay of belligerent vessels to such period as may be rendered necessary by the need of provisions and repair, or by stress of weather.

It follows naturally from the exclusiveness of national sovereignty that if a belligerent brings his prisoners within neutral territory, they instantly recover their freedom. This fact was well expressed by an Austrian ordinance of 1803: '. . . aussitôt que . . . prisonniers [de guerre] auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance.' This principle is not carried to its extreme logical conclusion in the case of belligerent prizes carried into neutral harbours. In these cases no change of property takes place until condemnation. The belligerent therefore, in Mr. Hall's words,[2] 'brings there property which does not yet belong to him: in other words, he continues the act of war through which it has come into his power. The anomaly is noticed by Phillimore:[3] 'An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793-1815) leads to the conclusion that a condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular but clearly valid.' Neutrals are now almost unanimous in denying the shelter of their harbours to belligerent prizes, so that instances of this irregular practice are likely to be rare in the future.

[1] *Cf.* the case of the *Tuscarora* and *Nashville*, *State Papers*, lxxi. 167, 1871.

[2] *International Law*, p. 642. [3] iii. § ccclxxix.

11. **Passage through Neutral Territory.**—Opinion has varied on the question whether a neutral may properly permit a belligerent army to pass through his territory. Such a permission was formerly held to be consistent with neutral duty, though later writers added the requirement that the right must be equally conceded to both belligerents. The qualification is not perhaps very reasonable, for it may very easily happen that a passage through neutral territory which is of importance to one belligerent offers no advantage whatever to the other. A belligerent will hardly demand leave to pass through such territory unless he hopes to derive some military advantage therefrom. It follows that the permission to do so is unneutral. Vattel's general statement[1] of the duties of a neutral is accurate, with a single exception, and it is decisive upon the point: A neutral is bound not to give any assistance, except where there is a previous stipulation, nor of its own will to furnish troops, arms, ammunition, or anything of direct use in war. He adds that to give assistance equally is absurd; a state cannot equally assist two enemies. The same things, the same number of troops, the like quantity of arms and of munitions furnished under different circumstances, are no longer equivalent succours. This view has prevailed in later times, and Phillimore[2] alone of modern writers supports the legality of conceding military passage. It will be noticed that Vattel makes a reservation in favour of the neutral when assistance is given pursuantly to an existing treaty, and Mr. Hall notes that the question might still arise in Europe, for the railway from Constance to Basle, which leads from the interior of Germany to the Rhine, passes through the Canton Schaffhausen, and Germany has a right of military passage over it. The question arose in the South African War in which this country was recently engaged. Sir Frederick Carrington was permitted to land at Beira in Portuguese territory with an English force on its way to

[1] *Droit des gens*, lib. iii. c. 7, § 104.
[2] iii. § 153.

Rhodesia. It appears that the Transvaal Government protested against the concession, which was defended by the Portuguese ministry in the course of debate, on the gound that England had stipulated for the right of passage in existing treaties. On principle this line of defence does not appear to be satisfactory. As between one belligerent A and a neutral C, it is either illegal for C to give B, the other belligerent, a right of passage, or it is not. If it is not, *cadit quæstio*; if it is, how can C defend himself to A by the plea that he was under contract to perform an illegal act?[1]

Cf. p. 132.

CHAPTER II

Belligerent Governments and Neutral Individuals

1. **General Principles.**—This branch of international law has been produced by the compromise between two irreconcilable principles, which may be generally stated as follows:—

(1) Neutrals are entitled to prosecute their trade during the continuance of war.

(2) Belligerents are entitled, for military purposes, to exercise a quasi-penal surveillance over certain forms of such trade.

2. It is important to notice carefully the legal character of acts which are prohibited under this head. The simplest illustration is furnished by the trade in contraband goods. *Prima facie* a neutral power has as good a right to carry on its trade with each of two belligerents during war as it possessed before its outbreak. Its friendship towards both parties continues, and it has, in a general way, full liberty to profit by the rise in market prices which commonly follows upon the outbreak of war. It was, however, long ago recognised that an undiscriminating licence to neutral traders was hardly to be reconciled with belligerent necessity. A state which had gradually exhausted the military supplies of its opponent could not tolerate their unrestricted renewal at the hands of neutral traders. At this point the rights of neutrals have definitely given way before those of belligerents. It is not, however, accurate to state that contraband trading, or the running of blockades, are illegal acts.

The prohibition is relative, not absolute. In no case do such acts compromise the neutral government, and the latter is neither legally nor morally constrained to discourage its subjects from engaging in them. The correct view was very clearly laid down by Lord Westbury in *ex parte* Chavasse, *in re* Glazebrook: [1]—

'In the view of international law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights, which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the highroad of nations, any munitions of war which are . . . in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The right of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful.'

3. In the case of contraband carriage, the noxiousness springs from the nature of the merchandise, whereas a declaration of blockade entirely withdraws from trade a particular area, and applies indifferently to all kinds of goods. In both cases, however, the controlling principle is identical.

[1] 34 L.J. (Bkcy.) at p. 18.

The right of the belligerent to carry his operations to a successful issue is allowed to override the rights normally belonging to the status of neutrality. The concession is a bare one, and attempts to extend it are likely to be jealously watched by neutrals in future warfare. Two such attempts have given rise at different times to practices which are very familiar, and one at least of which appears to have established itself. The practices in question are that of commercial blockade, and that which is known as the Rule of war of 1756.

4. **Commercial Blockade.**—The varieties of blockade have led to much confusion. It has been seen that a pacific blockade is a prebelligerent act conventionally held to fall short of war, and justifying (according to the better view) no constraint except towards the power blockaded. It will be seen that a blockade proper is the blocking of a hostile harbour or seaboard by ships, *as a step in military operations* in order to prevent ingress or egress. If such a blockade is ineffective, it is known as a 'paper blockade.' It was commonly held that the very grave interference with neutral trade involved in a blockade could only be justified by the coincidence of military operations, of which it formed a proximate part. The peculiarity of a commercial blockade lies in the fact that it assumes to dislocate neutral trade without the plea of imminent belligerent necessity, and indeed *without being necessarily associated with military operations at all.* According to the view which has apparently prevailed, the sole condition of the validity of a commercial blockade consists in the power of the blockading squadron to make it effective. If this practice is to be treated as established, it will no longer be possible to repeat the proposition that the neutral right to trade remains unaffected by war, except in so far as the trade is obstructive to belligerent operations. Mr. Hall's illustration is a very forcible one[1]:—

'According to existing usage, it would be legitimate in a war

[1] *International Law*, p. 657.

between England and the United States for the former power to blockade the whole Californian coast while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada.'

The theoretic objection to such blockades was well stated in a circular[1] sent by Mr. Cass to the American representatives in Europe:—

'The investment of a place by sea and land, with a view to its reduction, preventing it from receiving supplies of men and materials necessary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, *without any regard to ulterior military operations*, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration.'

5. **Rule of War of 1756.**—The right of neutrals to carry on all legitimately acquired trade was seriously threatened by what is known as the rule of war of 1756. In the eighteenth century European countries, by legislation upon the lines of the English navigation laws, were in the habit of restricting the commerce of their colonies to vessels of their own country. During the war against this country in 1756 the French became disabled, through their relative weakness upon the sea, from carrying on trade with their colonies. They then handed over the trade between the mother-country and her dependencies to Dutch vessels, but continued to exclude other neutral traders. The English prize courts thereupon condemned all Dutch vessels captured in

[1] Quoted Cobden, *Speeches*, vol. ii. p. 288.

the course of such traffic, on the ground that vessels so engaged had in fact passed into the merchant service of France. The rule was extended in 1793 so as to prohibit all neutral trade with the colonies and coast towns of the enemy which had not been open before the war. The principle upon which the English decision proceeded was stated as follows by Lord Stowell in the *Immanuel*:[1]—

'Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding [colonies]? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must fall to the belligerent of course—and if the belligerent chooses to direct his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it: he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, "True it is you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress."'

6. On behalf of the United States Mr. Monroe, in a letter to Lord Mulgrave of September 23, 1805, insisted that neutrals were entitled to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace. This view has upon the whole prevailed among American statesmen and jurists, though Chancellor Kent has intimated a different opinion.[2]

The question is not free from difficulty, and the answer depends upon the familiar compromise between neutral and

[1] 2 Ch. R. at p. 199.
[2] Kent, *Com.*, vol. i. pp. 90–92.

belligerent rights. Phillimore[1] usefully distinguishes the following cases:—

(1) The carrying on by the neutral of the trade between the belligerent mother-country and the colonies.

(2) The carrying on the coasting trade of the belligerent—such trade being confined in time of peace to the belligerent subjects.

(3) The carrying on the trade by a neutral from a port in his own country to a port of the colony of the belligerent.

(4) The carrying on by a neutral of a trade between the ports of the belligerent, but with a cargo from the neutral's own country.

In the first two cases the view seems reasonable that a neutral accepting a licence to trade in effect incorporates himself in the enemy fleet, and may fairly be treated as belligerent. As Mr. Justice Story expressed it: 'The property is considered *pro hac vice* as enemy's property, as so completely identified with his interests as to acquire a hostile character.' English lawyers will find little to criticise in the conclusion of the same high American authority on the general question. 'The British,' he continues, 'have extended the doctrine to all intercourse with the colony, even from or to a neutral country, and herein it seems to me they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial trade [with the mother-country] and the coasting trade; and the rule of 1756 (as it was at that time applied) seems to me well founded; but its late extension is reprehensible.' In fact, the extension with which Mr. Justice Story quarrels can only be defended on the assumption that the rights of neutrals are confined to trade which they possessed before the outbreak of war—an assumption quite impossible to reconcile with many facts which are not in question.

[1] *International Law*, vol. iii. p. 299.

7. **Continuous Voyage.**—The English application of the rule in 1793 was rendered still more severe by what was known as the doctrine of continuous voyage. Orders in council had so far relaxed as to allow the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence in a neutral bottom. This led to colourable evasions by neutral shippers, and the question was much discussed by what evidence the *bona fide* of a transhipment was to be established. Lord Stowell held that the landing of the goods and the payment of duties in a neutral harbour was evidence enough of a *bona-fide* importation: 'If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid.'[1]

The real issue in such cases was well shown in a short conversation between the Court and counsel in the *Polly*[2]:—

Court.—'Is it contended that an American might not purchase articles of this nature [in Spain] and import them, *bona fide*, to America on his own account, and afterwards export them?'

It was answered, No; that was not contended; but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with Spanish interests; and that no proof was brought of the payment of the duties in America, nor that the transaction was in any way conducted like a *bona-fide* importation for the American market.

In the later case of the *William*,[3] the test was stated by the Court of Appeal to be more general.

'Let it be supposed,' the judgment ran,[4] 'that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such

[1] The *Polly*, Q.C. Rob. at p. 369.
[2] At p. 365. [3] 5 C. Rob. 385. [4] At p. 395.

other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? . . . If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That these acts have been attended with trouble and expense cannot alter their quality or effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it.'

The rule of war of 1756, and the doctrine of continuous voyage, will arise less frequently now that the colonial system of Europe has chosen the better part of unrestricted intercourse, but it would be very premature to suppose that either has disappeared from the existing rules of international law.

CHAPTER III

The Law of Contraband

1. Il est considéré, de l'aveu de toutes les nations de l'Europe,' says de Martens,[1] 'comme contraire à la neutralité de permettre à nos sujets de transporter vers les ports de l'une ou des deux puissances belligérantes de certaines marchandises qu'on désigne sous le nom de contrabande de guerre.' The observation, for reasons which have been stated, requires qualification.[2] It is not a breach of neutrality for a neutral state to permit such traffic, but the belligerent government is left to confront, and exact reparation from, the offending neutral individual.

2. **Classification of Contraband.**—It is, unfortunately, not possible to put forward any hard and fast classification of contraband articles. An article may be contraband at one time and innocent at another. Grotius[3] divided all articles which may be the subject of neutral trade into three classes:—

(1) Articles, such as arms, which are useful only for war.
(2) Things which merely serve for pleasure, and have no warlike use.
(3) Things *ancipitis usus*, *i.e.* which may be used equally for peace and war, *e.g.* provisions, ships, tackle, horses.

It is clear, he observes, that articles falling under class (1)

[1] *Précis du Droit des gens*, lib. viii. c. vii. § 318.

[2] *Cf.* Ortolan, *Dip. de la Mer*, ii. 199.—'Il ne s'agit pas d'actes d'un gouvernement qui comprait la neutralité, mais d'actes de particuliers qui exercent leur traffic.'

[3] Lib. III. c. i. § 5.

are contraband, and equally clear that those under (2) are innocent. It is under the third head that difficulties mainly arise. In such cases he observes, 'Distinguendus erit belli status.'[1] And to the same effect a very famous writer on contraband, Heineccius:[2] 'Sometimes things of the very smallest importance became all-important, if the enemy is distressed for the want of them, and unable to procure a supply from any other source.' The judgment of the Court in the *Peterhoff*,[3] an American case, restated the Grotian arrangement: 'A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes the first consists of articles manufactured, and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace according to circumstances; and the third of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.'

3. **Arms.**—We may therefore with Ortolan[4] put arms and munitions of war on one side as being always and at all times contraband. In attempting a statement of the articles which may or may not be contraband, the decisive consideration must be the essentiality of a particular article to a belligerent under the circumstances of a particular struggle.

[1] A distinction must be drawn depending on the character of the war.

[2] 'Magnum sane aliquando momentum, in bellis habent res minimi momenti, si hostis laboret inopia; nec verum istarum aliunde copia sit.'—*De Jur. Prin. Civ. Com.*, § 12.

[3] 5 Wallace, p. 58.

[4] Vol. ii. p. 190.

4. **Naval Stores.**—In the *Maria*[1] Lord Stowell considered the case of naval stores: 'That tar, pitch, and hemp going to the enemy's use are liable to be seized as contraband in their own nature cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature.' Nor is it material, according to the English view, whether such articles are destined for a mercantile port or to a port of naval military equipment in the belligerent country. Thus in the *Charlotte*,[2] a number of masts on a voyage from Riga to Nantes were captured by an English vessel. The Russian owner appeared to resist the validity of the capture, but Lord Stowell directed condemnation. It appears therefore that in English courts naval stores, like arms, are treated as being absolutely contraband, and a statement to that effect is contained in the British Admiralty *Manual of Prize Law*.

5. **Provisions.**—Among the articles which are described as being occasionally contraband the case of provisions has excited the most frequent controversy. In the *Jonge Margaretha*[3] cheeses sent by a Papenberg merchant from Amsterdam to Brest, where a considerable French fleet was stationed, were condemned by Lord Stowell, and his judgment contains a valuable analysis of contraband character. He observes:[4] 'I take the modern established rule to be this, that generally provisions are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.' He goes on to enumerate three causes of exception tending to protect provisions from condemnation as contraband. First, that they are of the growth of the country which exports them; secondly, that they are in their native and unmanufactured state; thirdly, and chiefly, that they are intended for commercial and not for military consumption. The American doctrine does not differ from the English on this point. In

[1] 1 C. Rob. at p. 371*a*.
[2] 5 C. Rob. 305.
[3] 1 C. Rob. 189.
[4] At p. 193.

the *Commercen*,[1] Story, J., on behalf of the Court, accepted and restated the rules laid down by Lord Stowell in the *Jonge Margaretha*. English authorities could be readily multiplied. In the *Ranger*[2] a cargo of biscuit and flour had been put on board an American ship from the public stores at Bordeaux and was bound for Cadiz, though ostensibly documented for Ville Real in Portugal. Lord Stowell condemned the vessel, and his judgment is noticeable as suggesting that a claim might legally be made to condemn all provisions whether intended for military consumption or not:—

'This is a very gross attempt,' he says,[3] 'to abuse the instructions which were issued for the supply of provisions to Spain. It must always be remembered that this government might have availed itself of the interior distress of the enemy's country as an instrument of war; it did not, however, but humanely permitted cargoes of grain to be carried, without molestation, for the relief of the necessities of famine under which Spain had for some time laboured. It was natural to expect that a grant made with so much liberality would have been used with the most delicate honour and good faith both by Spain and her allies.' Acting on this view of her rights, England had seized in 1793 all vessels bearing provisions which were destined for French ports, and in her Chinese War in 1885 France denounced as contraband all cargoes of rice destined for ports north of Canton. Such claims are not consistent with the admitted rights of neutrals. The interference with neutral trade is limited by belligerent necessity, and to impose the pressure of starvation upon a non-combatant population can under no conceivable circumstances be a belligerent necessity.

6. **Destination.**—To justify condemnation, contraband goods must ordinarily have an enemy destination. During the American civil war this rule was very gravely modified by the American courts. Acting on a supposed analogy to Lord Stowell's doctrine of continuous voyage, which has

[1] 1 Wheaton at p. 587. [2] 6 C. Rob. 125. [3] At p. 126.

been considered in connection with the rule of war of 1756, the American judges held in the *Bermuda*[1]—

(1) That voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.

(2) That contraband is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect.

(3) Destination alone justifies seizure of contraband.

7. It followed from this decision that neutral traders could be arrested on mere suspicion of an intention to do an illegal act. It is clear that the English doctrine of continuous voyage lent no direct support to these pretensions. Indeed, in the *Imina*[2] Lord Stowell, the author of that doctrine, had explicitly held that the rule concerning contraband was that the articles must be taken *in delicto* in the actual prosecution of the voyage to an enemy's port. The American view, which was also acted upon in the case of the *Hart*,[3] has been made the subject of severe criticism, and Mr. Justice Nelson, himself a judge of the American Supreme Court at the time, has admitted: 'The truth is that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exceptions to that feeling.'

It is at the same time conceived that on principle the objection to the American doctrine rests in the extreme difficulty of proving to satisfaction an ultimate destination, in cases where mediate calls in neutral ports are admittedly contemplated. This objection will not apply to cases where the intention to carry a cargo then on board to an enemy port is in fact established. It is admitted that the evidence must be almost irresistibly strong, but assuming it to be so, it is not clear that the neutral has any ground of complaint. The case, in fact, falls within Lord Stowell's dictum in the

[1] 3 Wallace, 514; *cf.* the *Springbok*, 5 Wallace 1.
[2] 3 C. Rob. 167. [3] 3 Wallace 559.

Imina: 'A voyage is none the less a voyage to an enemy's port that it is broken by calls on the way.'

8. **Contraband in the Boer War.**—Unless these considerations are well founded, it is not clear that the English seizure of the *Bundesrath*, the *Herzog*, and the *General*, in African waters during the present year,[1] can be defended by satisfactory arguments. Yet by no other means could the legitimate rights of a belligerent be enforced in cases where the only approach to his enemy's country from the sea is through neutral ports. The right for which Lord Salisbury contended ought, no doubt, to be applied in practice with extreme considerateness and care, but it is certain to be claimed by every belligerent who sees that munitions of war are reaching his opponent through neutral channels. It may be remembered that Italy, in her Abyssinian campaign, held and acted on the English view.

9. **Penalty.**—The ordinary penalty for carriage of contraband is confiscation of the cargo, but if the articles belong merely to the class of occasional contraband, or if they are products of the exporting country, pre-emption at a fair valuation takes the place of confiscation. The modern rule is that the ship is not subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and as Lord Stowell observed in the *Neutralitet*,[2] it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting the illegal purpose cannot be innocent. The general rule, however, is that the vessel does not become confiscable for that act. But this rule is liable to exceptions. 'Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one.'[3]

[1] Blue-book, Africa, 1900, No. 1.
[2] 3 C. Rob. 295.
[3] 3 C. Rob. p. 296.

CHAPTER IV

The Law of Blockade

1. **Different Views.**—In the rules which regulate the incidents of blockade, considerable divergence exists between the practice of England and the United States on the one hand, and that of the chief continental powers on the other. Blockade may be generally described as the obstruction of commerce to a place by sea as an incident in hostile operations. It would be clearly unfair to neutrals that they should be subjected to the penalties of blockade-running, until they are affected by sufficient notification of the existence of blockade. Opinion, however, is far from unanimous as to the character of the necessary notification. In England and the United States it is the practice to notify neutral governments by a declaration of blockade, and such a notice is constructively held to affect their subjects. The latter are therefore not entitled to sail for the blockaded port, on the chance that the blockade may have been suspended, in the interval between their departure and their arrival. Knowledge, from whatsoever source derived, is sufficient to render the trader liable, and in theory condemnation may be justified by the simple fact of notoriety.[1] The English view was stated by Lord Stowell in the *Columbia*:[2]—

'But it has been said that by the American treaty there must be a previous warning; certainly where vessels sail without a

[1] See, however, the judgment of Dr. Lushington in the *Franciska*, Spinks 135.

[2] 1 C. Rob. at p. 156.

knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of the blockade, and therefore they are not in the situation which the treaty supposes. It is said also that the vessel had not arrived, that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade . . . was a beginning to execute that intention, and is to be taken as an overt act constituting the offence. From that moment the blockade is fraudulently evaded.'

In the *Columbia*,[1] Lord Stowell laid it down that, under no circumstances could a neutral individual be heard to plead ignorance of a blockade previously notified to his government. He pointed out that 'it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect.' 'I shall hold therefore,' he continued,[2] 'that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and it may raise a claim of compensation from them, but it can be no plea in the court of a belligerent.' The American view was stated in the judgment which Chase, C. J., delivered on behalf of the court in the *Circassian*:[3]—

'It is a well-established principle of prize law, as administered by the courts both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel, and, in most cases, its cargo, to capture and condemnation. We are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but, now, when steam

[1] 2 C. Rob. 112. [2] At p. 113. [3] 2 Wallace at pp. 151, 152.

and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights.'

The practice of France, Italy,[1] and Spain is more indulgent. The neutral trader is not affected with liability to seizure until he has been officially notified of the blockade on the spot by a vessel of the blockading squadron.

2. Two mitigations of the English and American practice may be mentioned. In the first place, vessels entering a place under blockade *de facto* only, or clearing from a home port before the public notification, are entitled to a particular warning;[2] in the second, 'where the port of clearance is very remote, lying at such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ship conjecturally, upon the expectation of finding the blockade broken.'[3] But as Lord Stowell added, and for obvious reasons, this inquiry should be made, not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities of fraud.

3. **Paper Blockades.**—It was laid down by the Declaration of Paris that blockades to be valid must be effective. Paper blockades, or such as are not supported by the material strength to make them effective, on the spot, are no longer permissible. The Napoleonic wars pushed this form of blockade to its illogical conclusion. The French Decree of Berlin in 1806 is well known:—

Art. 1. 'Les Iles Britanniques sont déclarées en état de blocus.'

Art. 2. 'Tout commerce et toute correspondence avec elles est défendu.'

[1] See 'Le droit des Prises Maritimes,' *Revue de droit int.* x. 240. Cited by Hall.

[2] *Vrouw Judith*, 1 C. Rob. 150, per Lord Stowell at p. 152.

[3] Per Lord Stowell in the *Betsy*, 1 C. Rob. at p. 334.

The decree was followed by retaliatory orders issuing from Great Britain, the legality of which was vindicated by Lord Stowell in the *Snipe*:[1]—

'These orders were intended and professed to be retaliatory against France; without reference to that character they have not, and would not, have been defended; but in that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communications of independent states are usually governed.'

4. **Effectiveness.**—It is agreed then that blockades must be effective, but there is no agreement to define 'effectiveness.' In England[2] and America[3] a blockade is held to be sufficiently effective, provided that, under normal conditions, a breach of it would be unlikely to succeed, or at least very difficult. The usual and regular mode of enforcing blockades is by stationing a number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port. If the arch fails in any one part, the blockade itself fails altogether.[4] The prize courts of Great Britain and the United States have not insisted that the effectiveness of the blockade shall be absolutely constant. An accidental interruption occasioned by violent weather or fog is treated as consistent with the continuance of a blockade;[5] and it has been held that the temporary withdrawal of a blockading vessel in order to chase a prize does not entitle neutrals to enter the port.[6] In the *Hoffnung*[7] Lord Stowell distinguished the case where a blockading squadron was driven off by a superior force:

[1] Edwards, pp. 381, 382.

[2] The *Columbia*, 1 C. Rob. 156; the *Hoffnung*, 6 C. Rob. 116; the *Frederick Molke*, 1 C. Rob. 86.

[3] Radcliff's case, T. Johnson's *American Cases*, p. 53.

[4] The *Arthur*, 1 Dodson at p. 426.

[5] The *Franciska*, Spinks 115.

[6] See the *Frederick Molke*, 1 C. Rob. p. 86; and compare the *Hoffnung*, 6 C. Rob. 116.

[7] 6 C. Rob. at p. 117.

'When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises. . . . In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed.'

5. **Continental Practice.**—The continental standard of effectiveness is much more exacting than that which is described above. It is fairly expressed by Ortolan, who refuses to recognise any blockade unless 'toutes les passes ou avenues qui conduisent sont tellement gardées par de forces navales permanentes, que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné.'[1] According to this view the disposition of the blockading squadron ought to be such as 'commander les abords par leur artillerie,'[2] *i.e.* must continually expose blockade-runners to a cross fire. Consistently with this view any interruption, however accidental and occasional, justifies neutrals in attempting to enter, and the blockade must be formally recommenced *de novo*.

6. **Egress.**—Egress from a blockaded place is ordinarily ground for condemnation,[3] unless the vessel leaving contains a cargo placed on board before the blockade,[4] or unless she entered before the blockade, and is merely leaving in ballast.

7. **Penalty.**—The penalty for breach of blockade is confiscation of the ship and cargo. The ship is liable until the return voyage is concluded, a rule only applicable to contraband trade when false papers are employed. The cargo is not condemned where it belongs to persons other than the owner of the ship, unless the owners of it can be affected with actual or constructive notice of the existence of the blockade.

[1] ii. 328. [2] Hautefeuille, tit. ix. c. ii. sect. 1. § 1.
[3] The *Juno*, 2 C. Rob. p. 119. 5 The Court Edwards, p. 32.
[4] The *Frederick Molke*, 1 C. Rob. p. 88.

CHAPTER V

Other Acts of Carriage involving Neutral Individuals in Penalties

1. Under this head the liability of a neutral vessel which is engaged in carrying enemy despatches, or belligerent officials, requires consideration. This branch of the law is sometimes headed 'Analogues of Contraband.' The principle on which the contraband prohibition, and that now under discussion, rests, is no doubt similar in its general character, but the analogy in its practical application is not very close.

Despatches.—The case of despatch-carrying presents fewer difficulties, and may be shortly dismissed. To adapt the language of Lord Justice Brown in a well-known English case,[1] a despatch is not like a fire: a neutral may carry it about without being bound to suppose that it is likely to do an injury. The general principle therefore is that neutral vessels are prohibited from carrying, or carry at their peril, despatches of which they knew or ought to have known the enemy character. Condemnation in these cases is usually constructive, and the destination of the despatches is in the ordinary run of cases the decisive consideration.

2. In the *Atlanta*[2] Lord Stowell condemned a Bremen ship which was carrying despatches from the governor of the Isle of France to the Minister of Marine at Paris. The case was aggravated by an attempt to conceal the documents.

[1] Emmens *v.* Pottle, xvi. Q.B.D. at p. 358.
[2] 6 C. Rob. 440.

The learned judge intimated his view of the gravity of the offence in the following passage: [1]—

'How is the intercourse between the mother-country and the colonies kept up in time of peace? By ships of war or by packets on the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state. . . . Nor let it be considered that it is an act of light and casual importance. . . . In the transmission of despatches may be conveyed the entire plan of campaign, that may defeat all the projects of the other belligerent in that quarter of the world. . . . It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy.'

3. In the *Caroline* [2] the despatches were being carried from the ambassador of the enemy's state resident in the neutral state to his own country. Lord Stowell directed restitution, basing a distinction upon the character of the person who is employed in the correspondence. 'He is not an executive officer of the government, acting simply in the conduct of its own affairs within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it.' [3]

4. **Enemy Passengers.** — The leading case on the carriage of enemy passengers is the *Orozembo*.[4] In that case an American vessel had been ostensibly chartered by a merchant at Lisbon to proceed in ballast to Macao, and there to take a cargo to America. He proceeded, however, to prepare it for the reception of three military officers, and two persons engaged in civil occupations in the government of Batavia. These five persons came on board, together with a lady and some servants, in all seventeen passengers. Lord Stowell condemned the vessel.[5] He observed: 'In this instance the

[1] At p. 455. [2] 6 C. Rob. p. 461. [3] At p. 467.
[4] 6 C. Rob. 430. [5] See p. 434.

military persons are three, and there are, besides, other two persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel.' The same judgment [1] may be cited as an authority for the proposition that a neutral engaged in the carriage of military persons cannot protect himself by alleging or proving ignorance. 'If the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done by enforcing the penalty of confiscation. . . . If redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger.' [2]

5. **The 'Trent' Incident.**—The excitement which followed upon the *Trent* incident [3] in 1862 is well within the memory of many persons now alive. During the American Civil War an English vessel, the *Trent*, cleared from Havana for England *via* St. Thomas, having on board Messrs. Mason and Slidell, who had been appointed envoys from the Confederate States to France and England. Off the coast of Cuba the captain of the *San Jacinthe*, an American frigate, boarded the *Trent* and removed the two envoys to his own vessel, whence they were transferred to prison. On these facts the English Government demanded the restoration of Messrs. Mason and Slidell. The United States acceded to the demand upon the relatively unimportant ground that the ship should have been brought in for adjudication. Mr. Seward, however, in a long despatch which illustrates very happily the inconveniences to which a politician exposes

[1] Pp. 434, 435. [2] P. 435.
[3] *Parliamentary Papers*, 1862, vol. lxii.

himself who gets up his international law for the occasion, maintained that the seizure was in other respects good, and that Messrs. Mason and Slidell were a species of contraband. Without inquiring into the assumption that persons can under any circumstances be treated as contraband, the reply was decisive that the *Trent* had a neutral destination: 'It is of the very essence of the definition of contraband,' said Lord Russell in his answer to Mr. Seward, 'that the articles shall have a hostile and not a neutral destination.' The American argument was reduced to absurdity with equal success by Historicus:[1]—

'The great and practical danger of the fallacious reasonings of Mr. Seward consists in this, that they would serve to justify, and may be taken to encourage, the captain of the *Tuscarora* to seize the Dover packet-boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket for Paris.'

6. **Penalty.**—The penalty for carriage both of despatches and of enemy persons is confiscation of the vessel. Neither the forfeiture of the despatches, nor the removal of the enemy passenger, could be relied on as a very sensible deterrent to neutral traders.

[1] *Letters on International Law*, p. 192.

CHAPTER VI

I. Free Ships, Free Goods. II. Enemy Ships, Enemy Goods

1. THESE maxims have been so often treated together that it may, perhaps, be worth while to preserve the collocation. There is, however, no necessary or logical connection between the two propositions, and they must be carefully distinguished to avoid confusion. The saying, 'Free ships, free goods,' merely expressed the view that enemy goods shipped on neutral vessels ought to be immune from capture; while by the phrase, 'Enemy ships, enemy goods,' the opinion was conveyed that neutral goods shipped on enemy vessels were so tainted by their surroundings as to become liable to condemnation. In each case, opinion was divided for many years, and in each case the view favourable to neutral privilege has finally prevailed. In the first case, therefore, the maxim stands: free ships make free goods, that is to say, a neutral vessel redeems the enemy quality of her cargo, so far as to protect it from capture; in the second case, the maxim has yielded to considerations based upon the intrinsic innocence of the cargo itself. It is therefore no longer true that carriage on a belligerent vessel necessarily affects neutral goods with a hostile character. Enemy ships do not make enemy goods. A short account may usefully be added of the steps by which these conclusions have been respectively reached.

1. FREE SHIPS, FREE GOODS

2. Until the middle of the seventeenth century the simple view was adopted that enemy goods were enemy goods,

and as such, liable to capture, wheresoever found. From 1650 onwards a large number of treaties are found stipulating for the immunity of such goods, where found on neutral vessels. This concession was especially valuable to countries engaged in a large carrying trade, and the Dutch were particularly active in procuring its conventional adoption. It was not, however, contended that apart from treaty, neutral ships were able to protect their cargoes, and in many cases, so far from the ship protecting the cargo, it was held that the cargo tainted the ship, and made it subject to capture. Acting upon this view several French *Ordonnances* declared that neutral ships carrying enemy cargoes were themselves confiscable.

In the eighteenth century, France attempted to establish the principle of protection, but her own maritime superiority led Great Britain to maintain the liability of the goods to seizure, though she did not attempt to involve the vessel in the fate of the cargo. The first armed neutrality in 1780 collectively issued an affirmation of the immunity of enemy goods, but the individual subscribers, in the course of mutual hostilities, soon abandoned their own principles. The reassertion of them by the second armed neutrality was equally transient. In the earlier part of the nineteenth century practice was still fluctuating. The number of states which desired amendment was considerable, but the existing law was accurately stated by Mr. Dana:[1]—

'The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:—

1. That a belligerent may take enemy's goods from neutral custody on the high seas.
2. That the carrying of enemy's goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere

[1] Note to Wheaton, § 475, cited by Hall.

with it on the high seas. While the Government of the United States has endeavoured to introduce the rule of free ships, free goods, by conventions, her courts have always decided that it is not the rule of war.'

3. The military association of Great Britain and France in the Crimean War furnished the occasion for the desired change. To secure uniformity of action England temporarily abandoned her practice and acquiesced, on the conclusion of peace, in the Declaration of Paris, which affirmed the principle of free ships, free goods. It will be remembered that the United States, Spain, Mexico, and Venezuela have not subscribed to this Declaration, but the United States recognised the neutral claim to protect in the Civil War, and the same course was adopted by both belligerents in the Spanish American War.

II. Enemy Ships, Enemy Goods

4. The theory that goods of no warlike use to the belligerent were so affected by carriage in his vessels as to become confiscable, owed its survival to the fact that it was too readily accepted as the antithesis of the phrase, 'Free ships free goods.' 'Free ships, free goods' was a reasonable concession to neutrals, which afforded no sort of justification for the infliction upon them of the hardship involved in 'enemy ships, enemy goods.' The practice expressed in the latter maxim, like commercial blockade, and the rule of war of 1756 in its extended forms, proceeded on a view of neutral rights far too narrow to square with admitted principles of international law. The *Consolato del Mare*[1] denied the liability to capture of neutral goods in enemy bottoms, and the same view was expressed by Albericus Gentilis:[2] 'Property which does not belong to the enemy is nowhere confiscable.' England was as a rule on the same side, whereas the weight of French policy was thrown into the opposite scale. Lord

[1] See Heffter, § 163. [2] *De Jure Belli*, lib. ii. c. 22.

Stowell in the *Fanny*[1] drew a distinction between the cases where the carrying vessel was a public or a merchant vessel of the belligerent. 'A neutral subject,' he said,[2] 'is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject nevertheless to the rights of the enemy who may capture the vessel, but who has no right, according to the modern practice of civilised states, to condemn the neutral property. Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen. But if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and, in so far as he does this, he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy.'[3]

5. **American View.**—On the general question the American view coincided with the English, but in the *Atlanta*[4] Johnson, J., refused to follow the distinction insisted upon by Lord Stowell. The learned judge observed:[5] 'The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be and probably will be changed . . . but so long as the principle shall be acknowledged this court must reject constructions which render it totally inoperative.' Nor did it make any difference that the belligerent vessel was an armed cruiser;[6] it was alleged, argued the learned judge, that the use of such a vessel by a neutral deprived the

[1] 1 Dodd. 443.
[2] At p. 448.
[3] Pp. 448, 449.
[4] 3 Wheaton 409.
[5] At p. 415.
[6] Pp. 424, 425.

other belligerent of his right of search, or of capture, or of adjudication of goods, but the right of capture applied only to enemy ships or goods; the right of search to enemy goods on board a neutral carrier: nor was the right of adjudication impaired. The neutral does not deny the right of the belligerent to decide the question of proprietory interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He had no right to capture it, and if it be hostile, covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases, subdue the ship before he gets the cargo.

6. **Declaration of Paris.**—The interest of these discussions is now chiefly historical, for at the time of the Crimean War France purchased the English adherence to the doctrine of free ships, free goods, at the price of a similar concession on her part in the practice under consideration, and the Declaration of Paris affirmed the English and the American view that neutral traders are in no way bound to refuse the convenience of belligerent carriage; in other words, that enemy ships do not make enemy goods.

7. It need hardly be said that a neutral trader, in one sense, acts at his peril in employing a belligerent carrier. If belligerent necessity impels the other belligerent to destroy the carrying vessel, the neutral has no remedy in respect of the concurrent destruction of his cargo. Destruction without such a real necessity would no doubt be a violation of the spirit of the Declaration of Paris, and, if a clear case be conceived, the neutral government might effectively intervene.

CHAPTER VII

Visit and Search

1. BELLIGERENT public vessels are entitled to stop neutral merchantmen upon the high seas in order to determine their character and the nature of the occupation in which they are engaged. The existence of this right is peremptorily required to enforce the control over neutral trade which belligerents are permitted to exercise. In the English leading case, the *Maria*,[1] Lord Stowell dwelt upon this point of view:—

'The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships or the cargoes or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges.'

2. **Convoyed Vessels.**—The question has been much discussed whether neutral vessels are liable to search at

[1] 1 Ch. Rob. 359.

the hands of a belligerent when they are sailing under convoy of a commissioned vessel of their own country. The governments and writers of the Continent are pledged to the view that vessels so sailing must not be searched. This opinion cannot be supported by the most influential practice, and the principle on which it proceeds is at least open to question. The claim to immunity was first put forward on behalf of Sweden in the seventeenth century, and the Dutch shortly afterwards placed under convoy some merchant vessels sailing from Cadiz to Flanders, and ordered the convoy to resist any attempt at search. Obediently to these instructions, De Ruyter, who was in charge of the convoy, beat off an English squadron which attempted to exercise the right of search. The Dutch claim was revived in the middle of the eighteenth century, and led to a warm dispute between the English and Dutch Governments. In 1781 Sweden put forward a similar claim as against Great Britain, and on appeal to Russia, received from that power, for what it was worth, an assurance that the claim to immunity for convoyed vessels was covered by the principles of the armed neutrality. As Mr. Hall[1] points out, the practice of visiting such vessels had been universal until 1781, and the claim to exemption had only 'acquired such consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of states possessing very defined and permanent interests.' The second armed neutrality laid down the principle of immunity, but the chief signatories of it soon fell short of their own standard.

3. English and American View.—The English view was well stated by Lord Stowell in the *Maria*:[2]—

'The authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a fully commissioned belligerent cruiser. I say legally, because what may be given . . . to considerations of comity or

[1] P. 747.

[2] 1 C. Rob. 359.

of national policy are views of the matter which I have no power to entertain. All that I can assert is that legally it cannot be maintained that if a Swedish commissioned cruiser, during the wars of his own country, has a right, by the law of nations, to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant ships of his country. . . . Two sovereigns may unquestionably agree, if they think fit, by special covenant . . . that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with neutrality. . . . But surely no sovereign can legally compel the acceptance of such a security by mere force.'

On this point, as on others, American judges are fully in agreement with our own, and Story, J., in the *Nereide*,[1] very forcibly observed: 'The law deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and, therefore, attributes to such preliminary act the full effect of actual resistance.' In practice, therefore, England and America are ranged on one side, France, Russia, Germany, Austria, Spain, and Italy on the other. The real weakness of the continental claim is that it presupposes in the commanding officer of a convoy an intimacy of information as to the cargo of the vessels convoyed which has no correspondence with facts. However complete his good faith, how can such an officer affirm of his personal knowledge that none of the vessels convoyed has contraband goods or enemy despatches on board?

4. **Formalities of Search.** — When a commissioned vessel wishes to exercise the right of search, it is usual to fly the colours and fire off a gun, called the affirming gun, as a signal to the merchant vessel. The requirement that the affirming gun or semonce shall be fired is common in continental practice, but is not peremptory according to the English and American view. In the *Marianna Flora*[2]

[1] 9 Cranch 440. [2] 11 Wheaton.

Story, J., delivering the judgment of the Court, made the following observations on this point:—

'We are not disposed to admit that there exists any such universal rule or obligation of an affirming gun as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded on their own usages or positive regulations. But it does not hence follow that it is binding upon all other nations. It was admitted at the argument that the English practice is otherwise; and surely, as a maritime power, England deserves to be listened to with as much respect on such a point as any other nation.'

5. In the same case it was pointed out that although the right of search does not exist in time of peace, yet a cruiser has a right to approach a foreign vessel for purpose of observation; it was held further that the vessel approached is under no obligation to lie-by, but that she has no right to fire at a cruiser approaching upon a mere suspicion that she is a pirate, and if this be done the cruiser may lawfully repel force by force and capture her. In order to make the actual visit, an officer is usually sent on board the merchantman from the cruiser, but sometimes the master of the merchantman is summoned to bring his papers to the cruiser for examination. Capture of a vessel searched is considered to be legitimate where the papers are false or insufficient, where resistance is offered to visit or search, and where the results of the visit make it certain, or at least highly probable, that the vessel is tainted by any of the forms of illegality which have been already considered.

APPENDIX A

The Hague Peace Conference

'As regards myself,' said M. de Staal, in his closing speech as President, 'I who have reached the term of my career, and the downward slope of life, consider it as a supreme consolation to have seen the opening of new perspectives for the good of humanity, and to have been able to cast my eyes into the brightness of the future.'[1] M. de Staal spoke with a generous enthusiasm natural in one who had presided with dignity and success over a congress in which many nations and many conflicting interests were represented. Perhaps the most clear-sighted estimate which has appeared of the work of the Conference was that which was made by Mr. Holls, the American representative, in an interview with the able *Times* correspondent.[2] Mr. Holls pointed out that any one who was naïve enough to expect disarmament, or the establishment of an international supreme court, with an international police force to enforce its decrees, would undoubtedly be disappointed. He added that the proposed treaty of arbitration was the best attainable result in the present state of public opinion all over the world. 'The formulating of the ideas of mediation and good offices, of arbitration, of international commissions of inquiry, and of procedure before courts of arbitration, is in itself a work of no small importance. . . . It will not prevent war where the question at issue is of such grave importance that the Government can, with the full approval of public opinion, disregard all the machinery which we have provided for its peaceful adjustment.'

It may be conjectured with some confidence that whatever positive influence for good the Conference may gain will be exercised in the manner indicated by Mr. Holls. Its highest utility will be found in the work of familiarising men's minds

[1] See the *Times* report, August 1, 1899. [2] August 1, p. 8.

with the arbitral idea in international matters, and with the imperative quality of the laws of war. As to the latter, soldiers and jurists[1] are alike agreed that their influence has infinitely relieved the horrors of war without impairing its efficiency for crushing the armed resistance of the enemy. Their reassertion, therefore, upon the authority of a great international council, formally representative of the armed forces of the world, marks an occasion of the highest significance. The agitation provoked by the use of expansive bullets in the Boer War illustrates the reality of what the Duc de Broglie called the 'moral effect' of the Conference. The Dutch Republics were unrepresented at the Conference, and the English representative did not sign the Declaration proscribing the use of Dum-Dum bullets. It was, nevertheless, assumed by both belligerent parties that the employment of such bullets was an offence against international usage.

The Peace Conference—to attempt a general summary of its results—disappointed the excessive sanguineness of those who foresaw in its convocation the beginning of

'The Parliament of Man, the Federation of the World,'

and repeated the quotation till it began to nauseate; but it rose far above 'the cheap wit and shallow philosophy' of those who predicted an unrelieved failure. The mere assembly of such a congress, the harmonious progress of its deliberations, and the weighty reserve of its pronouncements mark the advent of a stage in international history which is not unlikely to reduce the occasions of war, and is certain to mitigate the horror of struggles which it cannot prevent.

The Blue Book[2] which has been published hardly exhibits the positive results of the Conference with sufficient clearness for the ordinary reader. A short statement of them is therefore added for convenience of reference. Three Conventions were agreed upon by a majority, the same number of Declarations, and five *voeux*, or, as the word has been rendered, 'pious hopes.' The first Convention, on Arbitration, proceeded from the third committee. It is provided by Article 10 of the Final Act that commissions of arbitration are to be appointed by special convention between the disputing parties. The inquiry is to proceed

[1] With the lamented exception of Mr. T. G. Bowles.
[2] 'Russia, No. 1 (1899),' and continuation.

contradictoirement, *i.e.* by argument of the different points of view. An international Bureau, with its seat at the Hague, is called into existence by Article 22. To this permanent Bureau the signatory Powers consent to communicate all agreements to resort to arbitration, and all arbitral sentences made by special arrangement apart from the special tribunal. If the disputants cannot agree upon the choice of an umpire, they are bound by Article 24 to place the appointment in the hands of a third Power nominated by them both. The proceedings fall into two stages, called respectively 'Instructions' and 'Pleadings';[1] the 'Pleadings' shall only be public if both parties to the reference desire publicity.[2] The 'Final Act' itself of the Conference was signed by all the twenty-six States represented. The Convention on Arbitration was signed by sixteen of the Powers represented, Great Britain, Austria, China,[3] Italy, and Japan being among the abstainers.[4] The second Convention, due to the second committee, revised the draft resolutions of the Brussels Conference of 1874. This convention received fifteen signatures, Portugal becoming a non-signatory in addition to the States mentioned above. The third Convention, also proceeding from the second committee, provided for the extension to maritime warfare of the principles of the Geneva Convention of 1864. The draftsman of this Convention was M. Louis Renault, and the signatures and abstentions were identical with those of Convention II.

To the first committee had been intrusted all that was most pretentious in the Czar's scheme. Unequal to the burden, its members relegated the limitation of armaments to the decent seclusion of the *voeux*, and contented themselves with formulating three Declarations. These were to the following effect:—

Declaration I.

The undersigned, as plenipotentiary delegates at the International Peace Conference, duly authorised by their Governments to this effect, inspired by the sentiments

[1] Art. 39. [2] Art. 41.

[3] The Chinese representative was instructed to follow the German lead in everything—a tragic and ironical association in the light of recent events.

[4] It should be remembered that these signatures were provisional only, and that a considerable accession to the number in the future may be expected.

which found expression in the Declaration of St. Petersburg of December 11, 1868 . . . hereby declare that the contracting parties prohibit themselves, for a period of five years, from throwing projectiles or explosives from balloons or by other new analogous means.

Declaration ii.

The undersigned, etc., hereby declare that the contracting parties prohibit themselves from making use of projectiles, whose sole object is to diffuse asphyxiating or deleterious gases.

Declaration iii.

The undersigned, etc., hereby declare that the contracting parties prohibit themselves from making use of bullets which expand or flatten easily in the human body, as, *e.g.* bullets with a hard case, which case does not cover the whole of the enclosed mass, or contains incisions.

The first of these three Declarations was signed by the British delegates; the remaining two, for reasons which have been considered, were not formally accepted by them.

It is instructive to set out the *voeux*, or academic aspirations, if only to exhibit the grand objects of the Conference 'shrunk to this little measure.'

Voeux.

(i) The Conference considers that the limitation of the military charges, at the present time weighing upon the world, is greatly to be desired for the increase of the material and moral welfare of humanity.

(ii) The Conference expresses the wish that the question of the rights and duties of neutrals should be inscribed in the programme of a conference to be held at an early date.

(iii) The Conference expresses the opinion that questions relative to the type and calibre of rifles and naval artillery such as have been examined by it, should be the subject of study by the different Governments with a view to arriving eventually at a uniform solution by means of a further conference.

(iv) The Conference, taking into consideration the preliminary steps taken by the Swiss Federal Government for the revision of the Geneva Convention, expresses the wish that a special conference be shortly convened for the purpose of revising this Convention.

(v) With a few exceptions, the Conference unanimously resolves that the following questions should be reserved for examination by future conferences:—

1. A proposal tending to declare the inviolability of private property in war at sea.
2. A proposal regulating the question of the bombardment of ports, towns, and villages by a naval force.[1]

[1] Much of the information contained in this Appendix is derived from the admirable articles and reports contained in the *Times* (July and August 1899). See further the Blue Books, 'Russia, No. 1 (1899),' and its continuation, 'Miscellaneous, No. 1 (1899),' and G. de Lapradalle, *La Conférence de la Paix*, Paris, 1900, a useful little book, betraying, however, at times a charming *naïveté* of bias. *Cf.* also the review of M. Lapradalle's book by T. E. H. in the *Law Quarterly Review* for July 1900.

APPENDIX B

Guerilla Warfare and Combatant Character

THE sensitive humanity of some newspapers in the United States, and many in Germany, appears to have been wounded by Lord Roberts's proclamations on the subject of guerilla warfare and its penalties on person and property. It is therefore interesting to inquire what are, or recently were, the opinions officially held in these countries on the subject under consideration. First of the United States. Section iv. Article 82 of the American instructions published in 1863 deals with the subject as follows:—

> 'Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, *but who do so with intermittent returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers*—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.'

In view of this section it may perhaps be assumed that the Boer raiders would hardly have fared better at the hands of an American army of occupation.

The complaints of the German press have been more bitter and unanimous; it therefore becomes useful to recall the standard of military conduct adopted by Germany, when she was in occupation of French territory thirty years ago. On August 11, 1870, King William addressed a proclamation to the

French people from which the following extract may be given :—

> 'L'Empereur Napoléon ayant attaqué par terre et par mer la nation allemande, qui désirait et désire encore vivre en paix avec le peuple français, j'ai pris le commandement des armées allemandes pour repousser l'agression, et j'ai été amené par les événements militaires à passer les frontières de France. Je fais la guerre aux soldats et non aux citoyens français. Ceux-ci continueront, par conséquent, à jouir d'une complète sécurité pour leurs personnes et leurs biens, aussi longtemps qu'ils ne me priveront eux-mêmes, par des entreprises hostiles contre les troupes allemandes, du droit de leur accorder ma protection.'[1]

It will be observed that 'sécurité pour leurs personnes *et leurs biens*' is conditioned upon abstinence from hostile enterprises. If, however, there was any ambiguity in this language, there was none in that used by Dr. Busch with Bismarck's approval in the *Moniteur*.[2]

> 'The King said at the beginning of the war in his proclamation that he was going to wage it only against the armed power of France, not against its peaceful citizens. From these words it has been attempted to infer that we ought only to have fought against the Empire and not against the Republic, in presence of which it is supposed to have been our duty to lay down our arms. As for the peaceful citizens, the Francstireurs, and those who support them, are certainly not peaceable citizens. All the authorities on the law of nations, from Vattel to Bluntschli and Haller, *agree in this, that the considerate treatment of the peaceable population rests on the assumption that an absolutely distinct line is drawn between soldiers and civilians*, and that the civilian abstains from those hostile acts which are the duty of soldiers. What the soldier must do the civilian must not do, and if he takes hostile action against the foreign troops invading his country, *he loses the rights of a civilian without acquir-*

[1] *Bismarck in the Franco-German War*, by Dr. Busch, vol. ii. p. 139.
[2] *l.c.*, p. 206.

ing those of the soldier. When the soldier is no longer in a condition to do injury, he can demand to be treated mercifully, but the civilian who kills without being bound to do so, and *who thereby wipes out the line of demarcation, cannot be disarmed except by death.* The condition of a prisoner of war does not exist for him; *he must be annihilated in the interests of humanity.*'

When it is added that German practice did not lag far behind this statement of her strict rights, dispassionate observers will readily conceive what system of repression would have commended itself to Prussian commanders against a Boer who had violated a spontaneously taken oath of neutrality.

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